SECTION III

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TOPICAL INDEX TO CASE DIGESTS

ACADEMIC FREEDOM — CONTRACTS — DISCRIMINATION

New Jersey's strong public interest in eradicating discrimination in employment outweighs the public interest in preserving the confidentiality of peer-review material used by a university in its tenure and promotion decisions; instead of creating a qualified academic-freedom privilege, redaction procedures and protective orders limiting access to those involved in the proceedings will be required where, as here, such material is sought to establish a prima facie case of unlawful discrimination and the trial court is satisfied that the discrimination charge is valid and the requested material is relevant.

Plaintiffs in discrimination cases are encouraged to state their allegations with sufficient particularity to enable the trial court to determine whether there is any factual predicate for the claim, incorporating into the pleadings any and all information obtained from sources other than the material requested in discovery.

Although the terms in the collective bargaining agreement may limit plaintiff's access to the records in question for purposes of university procedure, they do not affect their use in proceedings under the Law Against Discrimination.

Supreme Court; Dixon v. Rutgers, The State University et al, A-85 Sept. Term 1987; opinion by Garibaldi, J.; concurrence by O'Hern, J.; decided May 25, 1988.

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ADDITUR

In determining the proper amount of an additur or remittitur the court must determine the amount that a reasonable jury, properly instructed, would have awarded; here, although an additur was properly invoked where plaintiff, a single, 24-year-old salesman, received facial lacerations requiring 71 sutures that resulted in scars described as a "perpetual frown" in a car accident where he was a passenger, and the jury awarded him only $750 in damages, the increase to $3,500 was an impermissible undervaluation, and the matter is remanded for a new trial as to damages.

Appellate Division; Tronolone v. Palmer et al, A-4471-86T8; opinion by Cohen, J.S.C.; decided March 23, 1988; approved April 13, 1988; in Opinions Approved column April 21, 1988.

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ADMINISTRATIVE LAW

Federal agency acting within scope of congressionally delegated authority may preempt state regulations.

City of New York v. Federal Communications Commission, 87-339, U.S. Supreme Court on Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit, May 16, 1988.

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ADMINISTRATIVE PROCEDURE — APPEALS

Where, as here, an agency head's decision, based on a review of the transcripts and documentary evidence, rejects many of the recommended findings of fact of the administrative law judge, who heard the live testimony, a reviewing court need give no deference to the agency head on the credibility issue.

Supreme Court; Clowes v. Terminix International, Inc., A-143 Sept. Term 1986; opinion by Clifford, J.; decided March 21, 1988.

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ADMINISTRATIVE PROCEDURE — JURISDICTION

These consolidated actions against the Department of Environmental Protection concerning its disposal of radioactive soil were brought to halt alleged threatened breaches of public and private rights, not to review an administrative proceeding, and thus they were properly instituted in the Law and Chancery Divisions; R. 2:2-3 (a)(2) does not apply where, as here, there is no agency record for the Appellate Division to review.

Appellate Division; Montclair v. Hegholy et al, etc., A-4678-86T5; opinion by Antell, P.J.A.D.; decided October 20, 1987; approved February 29, 1988.

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ADOPTION — PRISONERS

The father's incarceration for a minimum of 30 years (for having murdered the mother) includes the entire time that the son of the marriage would need him to perform the "regular and expected functions of care and support" (currently being provided by plaintiffs, the boy's maternal aunt and uncle), and is thus sufficient to terminate the father's parental rights under N.J.S.A. 9:3-46(a); the final hearing will deal with both the plaintiffs' adoption petition and that of the paternal grandparents.

Chancery Division, Family Part; In re White, opinion by Gehricke, J.S.C.; decided December 3, 1987; approved January 27, 1988.

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ADVERSE POSSESSION

Since the "encroachment" by plaintiffs' predecessors in title (merely planting some flowers and vegetables on their side of defendants' retaining wall) would have been for little more than a foot along the common border line, this falls within the "minor" encroachment concept of *Mantilo*, and the presumption of notice does not apply; there was no proof that defendants' predecessor in title had actual knowledge, and the trial judge should not have awarded plaintiffs adverse possession of the strip of land (prudence would seem to require allowing some space on the far side of a wall or fence as a margin for error or to allow for repairs, etc.).

Appellate Division; Maggio v. Pruzansky, A-2900-86T7; opinion by Petrella, P.J.A.D.; decided February 18, 1988; approved March 3, 1988.

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AGE DISCRIMINATION IN EMPLOYMENT ACT

Valenti v. International Mill Services Inc. and IU International Corporation, Third Circuit Court of Appeals, Nos. 86-1367, 86-1394, 86-1478, 86-1479, 86-1600, and 86-1681, filed Dec. 29, 1987.

On appeal from the United States District Court for the Eastern District of Pennsylvania. Opinion by Mansmann, Circuit Judge.

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AGGRAVATED MANSLAUGHTER — DEATH BY AUTO

Aggravated manslaughter and death by auto are separate indictable offenses and, depending on the circumstances, a defendant who caused a death by reckless driving may be indicted for either or both; here, defendant's decision to drive while severely intoxicated and the manner in which he operated his pickup truck indicated a clear disregard for the lives of others, and the denial of his motion to dismiss the indictment for aggravated manslaughter is affirmed.

Appellate Division; State v. Bogus, A-3626-85T5; opinion by Michels, P.J.A.D.; decided March 4, 1988; approved March 18, 1988; in Opinions Approved column March 31, 1988.

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AIDS — PRISONERS

Inmates with AIDS are not exempt from *Priester's* requirements for establishing an entitlement to an R. 3:21-10(b)(2) release; although the current involvement in an anti-drug campaign by this prisoner (a former drug addict with an unenviable criminal record) is impressive, the trial judge fell wide of the mark in concluding that he should be released from prison prior to his parole-eligibility date since there is no evidence that he is in any danger of imminent death or that his continued confinement in the AIDS unit would hasten the progress of the disease.

Appellate Division; State v. Wright, A-566-87T5; per curiam (Judges Brody, Long and Scalera) opinion; decided November 17, 1987; approved December 2, 1987.

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ALCOHOLIC BEVERAGES

The revocation of appellant's plenary liquor license was erroneously based on N.J.S.A. 33:1-25 here, where its former president and 60% shareholder, who has been convicted of drug crimes, had transferred all his shares to his wife and was no longer an officer; since the wife has sued for divorce, changed the name of the bar and fired all of its former employees, this case is distinguished from those where wives were fronting for disqualified husbands.

Based on the evidence before it, the township council was given the wrong impression of the comparatively little drug activity (some telephone calls) that took place on the licensed premises, and probably did not know that the then part owner and now sole owner was not aware of them; this matter is remanded because the penalty of revoking a plenary liquor license where only a violation of N.J.A.C. 3:2-23.5 may be found to have occurred must be reconsidered.

Appellate Division; Country Hearth, Inc. v. Old Bridge Tp. Council et al, A-2847-86T8; opinion by Brody, J.A.D.; decided November 30, 1987;

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Neither public sentiment nor the municipality's rationale for denying a transfer may be based on the desire to eliminate that liquor license or to provide other liquor establishments with protection against economic competition; the determination of the director of the Division of Alcoholic Beverage Control that the municipality's denial of A & P's application to relocate after it was unable to renew the lease to its prior licensed premises, through no fault of its own, was unsubstantiated and discriminatory is affirmed as reasonable and legally grounded.

Appellate Division; The Great Atlantic & Pacific Tea Co., Inc. v. Point Pleasant Beach et al, A-1483-85T1; per curiam (Judges Deighan, Havey and Muir) opinion; decided August 3, 1987; approved October 8, 1987.

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ALCOHOLISM — ATTORNEYS — ETHICS (See also **Armed Services**)

Respondent was not so impaired that he did not know what he was doing when he misappropriated client funds and, although alcoholic dependency clearly contributed to the loss of his critical control of judgment, his dependency cannot forestall his disbarment.

Supreme Court; In re Harry N. Devlin of Westfield, D-11 Sept. Term 1987; per curiam opinion; decided January 15, 1988.

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Neither the grave medical disorder (Reiter's Syndrome) from which respondent suffered nor alcoholism, standing alone, would mitigate any ethics breaches involving dishonesty or misappropriation, but they may explain ethics breaches involving inadequate professional performance (such as, here, the neglect, delay, etc., that occurred ten years ago); while alcoholism as such will rarely excuse any ethics transgressions, the exacerbation of physical disease by alcoholism can be a relevant mitigating factor in assessing ethical guilt and respondent (who has not had any alcohol for over eight years) is suspended for six months.

Supreme Court; In re Richard L. Barbour of Toms River, D-8 Sept. Term 1987; per curiam opinion; decided January 15, 1988.

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ALCOHOLISM — DISCRIMINATION

Alcoholism is a disease and is therefore a handicap protected by the Law Against Discrimination (if it does not impede job performance); however, expert medical testimony is required to establish the fact of an employee's alcoholism and, since appellant failed to establish either that he was an alcoholic or that his job performance was acceptable, the Appellate Division's dismissal of his complaint is affirmed (since the Alcoholism Treatment and Rehabilitation Act was not mentioned in this litigation, its interpretation is not undertaken here).

Supreme Court; Clowes v. Terminix International, Inc., A-143 Sept. Term 1986; opinion by Clifford, J.; decided March 21, 1988.

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ALIBIS — CRIMINAL PROCEDURE

The sanction of precluding a defendant's alibi testimony for noncompliance with the alibi-notice rule is not to be imposed lightly but it was properly and constitutionally imposed here, where defendant told no one (not even his attorney) until he testified on direct examination that he was "home in New York" when the robbery in Paterson took place; R. 3:11 and its predecessors were promulgated to avoid this precise situation, and no effective lesser sanction against defendant was available (even if erroneous, the ruling was harmless beyond a reasonable doubt here, where the evidence against defendant was strong).

Appellate Division; State v. Gonzalez, A-4406-84T4; opinion by Landau, J.A.D.; decided March 2, 1988; approved March 23, 1988; in Opinions Approved column March 31, 1988.

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ALIBIS — SELF-INCRIMINATION

Defendant's right to remain silent was violated when the trial court permitted the prosecutor to cross-examine him on his failure to disclose his alibi defense until three days before trial (13 months after the prosecutor had served him with a bill of particulars pursuant to R. 3:11-1), and also permitted the prosecutor to comment during summation on that failure; an inference of recent fabrication arising from a late-supplied alibi is insufficient reason for permitting a defendant's silence to be used to attack his exculpatory trial testimony.

Appellate Division; State v. Acata, A-5668-86T4; opinion by Gaynor, J.A.D.; concurrence by Stein, J.S.C. (t/a); decided February 10, 1988; approved February 24, 1988.

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ANTITRUST

Vertical restraint is not illegal per se unless it includes some agreement on price or price levels.

Business Electronics Corp. v. Sharp Electronics Corp., 85-1910, U.S. Supreme Court on Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit, May 2, 1988.

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State-action doctrine does not protect physicians from federal antitrust liability for peer-review committee activities.

Patrick v. Burget, 86-1145, U.S. Supreme Court on Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit, May 16, 1988.

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APPEALS
(See also **Administrative Procedure**)

R. 2:4-2(a) is construed as contemplating cross appeals "as of right" that are addressed to the same aspect of the order under review as to which leave to appeal has already been granted; the trial court's disposing of numerous motions, on a wide diversity of issues, in a single document as a matter of convenience did not entitle defendants to cross appeal the issue of their liability here, where the Appellate Division had only agreed to review the correctness of the trial court's limiting the retrial on damages to the issues of disability and impairment.

Appellate Division; Lamont v. Greenberg et al, A-5416-85T1; opinion by Antell, P.J.A.D.; decided February 11, 1988; approved March 3, 1988.

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ARBITRATION
(See also **Attorneys' Fees**)

Collective Bargaining Agreements.
Lodge 802, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO (appellants) v. Pennsylvania Shipbuilding Company, Third Circuit Court of Appeals, No. 87-1354, filed Dec. 28, 1987.

On appeal from the United States District for the Eastern District of Pennsylvania.
Opinion by Sloviter, Circuit Judge.

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The Construction Industry Arbitration Rules of the American Arbitration Association expressly provide that the AAA may not unilaterally extend the time for making an award (30 days after the hearings are closed -- here, the date set for the receipt of final briefs) and this award, made six weeks later, would have to be vacated were it not for the "waiver of rules" provision in the Construction Industry rules; by failing to timely object to the arbitrators' delay, defendant waived its right to object, and the award is confirmed.
Chancery Division; Zarvos v. Freedman Properties, Ltd., C-7619-87; opinion by Wells, J.S.C.; decided December 14, 1987; approved March 14, 1988; in Opinions Approved column March 24, 1988.

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Since the collective bargaining agreement specifically provided that drinking on the premises "shall be cause for discharge" and the employer twice posted notices reiterating the prohibition, the arbitrator exceeded his authority by modifying the penalty for several employees who were discharged for drinking to disciplinary suspension; having found that the conduct had taken place, the arbitrator could not fashion a less severe remedy by reading into the contract a system of progressive discipline where no other contract terms would permit the reduction of the sanction (*Local 153* is distinguished here, as it was in *Morris County College*).
Appellate Division; Local 462, Int'l Brotherhood of Teamsters etc. v. Charles Schaefer & Sons, Inc., A-2471-86T8; opinion by Michels, P.J.A.D.; decided February 2, 1988; approved February 9, 1988; in Opinions Approved column April 14, 1988.

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ARBITRATION — BANKRUPTCY — SURETIES

The automatic stay of proceedings accorded by 11 U.S.C.A. §362 may not be invoked by those whose liability to the creditor has an independent basis; the sureties for contractors for a county facility who declared bankruptcy while arbitration proceedings were pending cannot have those proceedings stayed as to them where, as here, they have been accorded due process.
Appellate Division; Seaboard Surety Co. et al v. Warren Cty. Bd. of Chosen Freeholders, A-548-87T5; opinion by Pressler, P.J.A.D.; decided February 2, 1988; approved February 9, 1988.

121 N.J.L.J. Index Page 736.

ARBITRATION — WAIVER

The mere assertion of an objection to the arbitrator's jurisdiction does not preclude a finding of waiver (the definition of which in *N.J. Mfrs.* is too limited); here, the nature and degree of defendants' participation in the arbitration were such that they must be deemed to have waived their right to a judicial determination of the arbitrator's jurisdiction, and the dismissal of plaintiff's action to confirm the award is reversed.
Appellate Division; Highgate Development Corp. v. Kirsh, A-4536-86T7; opinion by Gaulkin, J.A.D.; decided April 8, 1988; approved April 20, 1988; in Opinions Approved column May 19, 1988.

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ARMED SERVICES & VETERANS

Primary alcoholism is properly characterized as willful misconduct for purposes of GI Bill educational benefits extensions.
Traynor v. Turnage, 86-737, U.S. Supreme Court on writ of certiorari from the D.C. Circuit Court of Appeals, April 20, 1988.

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ARRESTS — COMPLAINTS

Since the citizen who went to the police and said that defendant had struck him did not sign the assault complaint, under oath, in the presence of the deputy court clerk, who falsely attested that he had when she signed the warrant the police officer had typed up, the warrant was issued in violation of federal and state constitutional provisions, N.J.S.A. 2A:9-27 and R. 3:2; this was no mere technical violation since a judicial officer must neutrally evaluate whether the sworn allegations show the required probable cause, and the marijuana the police officers seized in defendant's apartment when they went to execute the warrant should have been suppressed.
Appellate Division; State v. Bobo, A-5749-85T4; opinion by Stein, J.S.C. (t/a); decided December 14, 1987; approved January 11, 1988.

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ARSON — MERGER

The trial judge was correct in not merging defendant's conviction for arson with his convictions for the resulting manslaughter and aggravated assaults; not only are the elements and consequences of each crime different, the Legislature intended to punish arson separately based on the risk that fire presents.
Appellate Division; State v. Lewis, A-1778-85T-4; opinion by Ashbey, J.A.D.; decided February 24, 1988; approved March 4, 1988; in Opinions Approved column March 17, 1988.

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ASSAULT — SEXUAL ASSAULT

Although the proof of bodily injury would have supported a conviction for simple assault in this case, the indictment did not charge it and it is not a lesser included offense of either sexual assault or criminal sexual contact, the charges on which defendant was convicted; therefore, his argument that the trial court's not charging simple assault *sua sponte* was ground for reversal is rejected.
Appellate Division; State v. Queen, A-5236-85T4; opinion by Furman, P.J.A.D.; decided January 11, 1988; approved January 22, 1988.

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ASSAULT — WEAPONS

Where a defendant is charged with the second-degree crime of causing serious bodily injury under N.J.S.A. 2C:12-1b(1) and the assault was committed with a deadly weapon, the fourth-degree crime of recklessly causing bodily injury with a deadly weapon, 1b(3), is a lesser included offense of 1b(1); the analysis to the contrary in *Mincey* and *Jones* is flawed because 2C:1-8(d)(1) requires that the lesser included offense be established by proof of the same or less than all the *facts*, not the *elements*, of the offense charged.
Appellate Division; State v. Graham, A-3162-86T4; opinion by Brody, J.A.D.; decided March 15, 1988; approved April 4, 1988; in Opinions Approved column April 14, 1988.

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ATTEMPT

Under the expanded concept of attempt in N.J.S.A. 2C:5-1(a)(3) and (b), the jury could conclude that defendant had taken sufficient steps in carrying out the conspiracy to have committed the crimes of attempted escape and attempted murder here, where he visited the scene of the planned crimes and received payment in advance, even though substantial additional steps were needed to accomplish his codefendant's escape and he still had ample opportunity to change his mind about committing the crimes; the trial court did not err in not instructing the jury that preparation is insufficient to sustain a conviction for attempt.
Appellate Division; State v. Forshee, A-5448-83T4; opinion by Skillman, J.A.D.; decided February 16, 1988; approved March 23, 1988; in Opinions Approved column April 7, 1988.

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ATTORNEY-CLIENT PRIVILEGE — GRAND JURIES — RIGHT TO COUNSEL

Although *Fellerman*, a civil case, is not controlling where the client is a criminal defendant and the attorney-client privilege thus has a constitutional dimension, certain of its principles are applicable; the aggregate of circumstances here (where the grand jury has already returned an indictment charging the client as a fugitive, there are other means of obtaining information that he is a fugitive and of developing the record in support of an indictment or presentment, and the prosecutor is employing the grand jury as his investigative arm to obtain information unrelated to the indictment) requires that the attorney cannot be compelled to answer questions before the grand jury concerning the whereabouts of his client.
Appellate Division; In re Joseph Nackson, A-5773-86T5; opinion by Stern, J.A.D.; decided November 19, 1987; approved December 2, 1987.

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ATTORNEYS

Mandatory disqualification of an attorney who had been affiliated with the adversary's firm, regardless of the attorney's actual involvement with the adversary's file, is no longer required; rather, the "appearance of impropriety" analysis is to be used in situations covered by RPC 1.7 and other rules, such as 1.9, that incorporate it.

Although the finding that an attorney's prior involvement in an adversary's case was, although peripheral, sufficient to constitute "representation" would ordinarily mandate disqualification of that attorney's new firm, that will not be ordered on the eve of trial here, where the side-switching attorney had not *actually* represented the adversary or acquired confidential information about its affairs; however, because the attorney and his new firm failed to address the obvious ethical implications of their relationship, their continued representation of plaintiff will be without compensation for services performed after the date of this opinion.

Motions to disqualify attorneys because of their alleged representation of conflicting interests should ordinarily be decided on the affidavits and documentary evidence submitted, and any inquiry into an attorney's actual acquisition of protected information is a device of last resort; if disqualification is required under RPC 1.9 or 1.10 (b) the court must weigh that conclusion against the affected client's right to counsel of one's choice, but only in the most unusual case (such as this one) will that right prevail.

The reference to "RPC 1.9 (b)" in the last line of RPC 1.10(b) is corrected to read: "RPC 1.9(a)(2)."
Supreme Court; Dewey v. R.J. Reynolds Tobacco Company et al, A-86 Sept. Term 1987; opinion by Clifford, J.; decided February 1, 1988.

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Limitations on Access to Correctional Facility.
Sturm,(appellant) v. Clark, et al., No. 87-5170, Decided Dec. 14, 1987.
On appeal to the United States Court of Appeals for the Third Circuit from the United States District Court for the Middle District of Pennsylvania.
Opinion by Rosenn, Circuit Judge.

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ATTORNEYS — CONTEMPT

Where an attorney committed contempt in the face of the court and summary proceedings were held pursuant to R. 1:10-1, it was not error to deny his request for additional time to obtain a copy of the transcript; the judge provided copies of the relevant transcript pages, the attorney had ample time to obtain a copy of the transcript prior to the hearing, there was no factual discrepancy, and counsel was able to argue thoroughly without additional transcript pages.

The delay in adjudicating the penalty for the contempt until the end of the underlying trial did not convert the summary proceeding into a proceeding under R. 1:10-2 since the attorney's words were spoken in the judge's presence and he was informed after each incident that a hearing would be held.

Appellate Division; In The Matter of William J. DeMarco, A-4363-86T5; per curiam (Judges Petrella, Baime and Ashbey) opinion; decided March 23, 1988; approved April 18, 1988; in Opinions Approved column April 21, 1988.

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ATTORNEYS — DEFAMATION

The accusation (that plaintiff had been skimming funds from her employer) in the letter written by the employer's lawyer, in reply to a response to a subpoena he had served on one who was not a party to the employer's suit against plaintiff, is absolutely privileged as having been "published in the course of a judicial proceeding;" and plaintiff's libel action against the lawyer is dismissed.
Law Division; DeVivo v. Ancher et al, L-066029-86; opinion by Arnold, J.S.C.; decided July 17, 1987; approved October 26, 1987.

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ATTORNEYS — ETHICS

Respondent is disciplined with a two-year suspension (retroactive to July 1, 1986) for conspiracy to defraud the United States; in future, fraud on unknown and perhaps unidentifiable victims will result in a lengthy suspension or disbarment.
Supreme Court; In re Andrew D. Solomon of Livingston, D-68 Sept. Term 1987; per curiam opinion; decided April 8, 1988; in Opinions Approved column April 21, 1988.

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In both these matters respondent persisted in representing clients after he had specifically been discharged and took serious actions unauthorized by the clients (in one case, securing an unauthorized, ex parte consent order and, in the other, filing a complaint against two of the three family members he represented); in both matters respondent showed an insensitivity to his clients and to the court, and he is suspended for three months.

Supreme Court; In re Edward Brady of Haddon Heights, D-7 Sept. Term 1987; per curiam opinion decided May 6, 1988; in Opinions Approved column May 19, 1988.

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Although respondent's fees as township attorney were not found to have been extortionate or fraudulent, he cannot be excused from responsibility for overbilling, duplicating bills and failing to credit items in the client's account; similarly, although transferring his assets after the township obtained a civil judgment against him (15 years ago) may not present evidence of criminal fraud or of knowing misappropriation of funds, that conduct fell far short of what should be expected of an attorney representing a public client, and respondent is suspended for six months.

Where, as here, a civil litigant has a financial interest in matters that are the subject of a disciplinary complaint, that party's attorney should not be appointed to represent the interests of the public in disciplinary proceedings.

Supreme Court; In re Laurence A. Hocker of Toms River, D-14 Sept. Term 1987; per curiam opinion; decided March 18, 1988.

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ATTORNEYS — ETHICS — GAMBLING
(See also **Alcoholism**)

The record in this case does not reflect an impairment of respondent's will by his compulsive-gambling condition sufficient to excuse or mitigate his knowing misappropriation of $600,000 of his clients' funds, and he is disbarred.

Supreme Court; In re Harvey Goldberg, D-11 Sept. Term 1986; per curiam opinion; decided January 22, 1988.

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Impulse disorders such as respondent's compulsive gambling, because of which he knowingly misappropriated clients' funds, are extremely difficult to understand; what is known, however, leads to the conclusion that dependent attorneys retain an area of volition sufficient that they cannot be distinguished from those who yield to the equally human impulse to avert shame or family suffering, and the appropriate discipline is disbarment.

Supreme Court; In re Arthur J. Lobbe of Bayonne, D-47 Sept. Term 1987; per curiam opinion; decided March 25, 1988; in Opinions Approved column April 14, 1988.

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Serious as respondent's compulsive-gambling condition (now in remission) is, it by no means rendered him incapable of controlling his conduct, and his knowing misappropriation of trust funds (even though no client experienced a loss of funds) breached a public and professional trust that cannot be repaired by discipline less than disbarment.

Supreme Court; In re Louis J. Nitti, D-13 Sept. Term 1986; per curiam opinion; decided May 27, 1988.

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ATTORNEYS — NAMES
(See also **Ethics**)

The ruling of the Advisory Committee on Professional Ethics that petitioners' choice of an "A, B & C" firm name violates RPC 7.5(d) as it now stands is affirmed, but a special Supreme Court committee will review the matter further and develop a record to help the Court evaluate the fine-tuning of the rule that might allow appropriate designations of such an association of attorneys who are full-time employees of an insurance company and do not represent members of the general public; if this form of practice results in lower legal costs, the public has an interest in seeing that able attorneys continue to be attracted to it.
Supreme Court; In re Weiss, Healey & Rea et al, A-45 Sept. Term 1987; opinion by O'Hern, J.; decided February 4, 1988.

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The contingency-fee rule does not apply to "business torts" as opposed to "typical" negligence cases; although the tort that was newly identified by the Supreme Court in this case (an independent auditor has a duty to all those he should reasonably foresee would be, for proper business purposes, recipients of his audits) may not have been specifically contemplated by R.1:21-7, that rule was not designed to protect one who is sufficiently sophisticated to review and rely on a certified audit when deciding business matters, and it does not apply to fee arrangements between those plaintiffs and their attorneys.
Appellate Division; Rosenblum, Inc. et al, v. Adler et al A-2194-86T5; opinion by Landau, J.A.D.; decided December 2, 1987; approved December 18, 1987.

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Based on the "common nucleus of operative facts" doctrine, where plaintiffs alleged a violation of zoning ordinances based on both a federal claim (the Fair Housing Act) that permits attorneys fees and a state claim that does not, and where the action was decided in plaintiffs' favor based on the state claim, plaintiffs are entitled to a de novo trial to determine whether the evidence presented establishes a prima facie violation of the federal claim.
Appellate Division; Urban League of Greater New Brunswick et al v. Township Committee of Cranbury et al, A-3416-86T1; opinion by Coleman, P.J.A.D.; decided December 29, 1987; approved January 22, 1988.

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ATTORNEYS' FEES — AUTO ARBITRATION — CONSORTIUM

Although the better practice is for arbitrators to set forth their per quod awards separately from their awards for personal injury, the total award in this case was clearly intended to encompass the claims of both plaintiffs, and that total award is what is considered in determining eligibility for counsel fees and litigation costs under R. 4:21A-6(c)(1); since plaintiffs' recovery attributable to the tortfeasor who demanded a trial de novo was only 12.5% less than the arbitrator's award against him, he may be liable to them for their reasonable litigation costs.
Appellate Division; Coughlin v. Morell et al, A-3851-86T7; opinion by Skillman, J.A.D.; decided December 29, 1987; approved January 22, 1988.

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ATTORNEYS' FEES — CIVIL PROCEDURE

Although R. 4:23-5(a) would prohibit restoring these complaints, dismissed for failure to provide discovery, because formal motions were not made within the 30 days provided for in that rule, relief may be granted under R. 4:50-1; however, attorneys should be held accountable for not properly processing cases they undertake and, since R. 4:23-1 through -4 contemplate that a delinquent party reimburse the other party for its costs of obtaining discovery, these cases will be restored upon satisfactory completion of discovery and the payment of defendant's reasonable attorneys' fees (as well as the $50 sanction to the Superior Court Clerk).
Law Division; Humiec v. Hoffman-La Roche, Inc. et al, etc., L-087631-85; opinion by Yanoff, J.S.C. (t/a, ret.); decided July 23, 1987; approved December 18, 1987.

121 N.J.L.J. Index Page 431.

ATTORNEYS' FEES — CONDEMNATION

Despite the court's intention that the dismissal of the condemnation action should be "without prejudice" so that the county should be free to institute a new one after it had satisfied its obligation to attempt to acquire the property through bona fide negotiations, the order was a "final judgment" within N.J.S.A. 20:3-26b and a "judgment ... dismissing the action" within 20:3-24 so as to entitle defendants to reimbursement for their reasonable expenses and attorneys' fees in defending the proceeding.
Appellate Division; Morris County v. 8 Court Street Limited, A-3027-86T1; opinion by Antell, P.J.A.D.; decided February 18, 1988; approved March 3, 1988.

121 N.J.L.J. Index Page 866.

ATTORNEYS' FEES — CREDITORS' RIGHTS

Here, where the defaulting debtor was given notice of the sale of the collateral but the sale did not comply with UCC requirements, the burden is on the secured creditor to prove both the reasonableness of the sale and the fairness of the price; the measure of damages for this commercially unreasonable sale is the difference between the amount actually recovered and the amount that should have been recovered; the fact that the sale was not conducted in a commercially reasonable manner does not bar the contracted-for attorney's fee.
Law Division; Midlantic National Bank v. Coyne et al, L-027557-85; opinion by Yanoff, J.S.C. (t/a, ret.); decided November 12, 1987; approved December 1987.

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ATTORNEYS' FEES — LANDLORD AND TENANT

There is no ground for the award of counsel fees in this case for possession brought by the assignee of a lease against the assignor, and no reason to deviate from the well-established rule that legal fees are not recoverable unless authorized by statute, court rule, or contract; the Appellate Division's conclusion that the original lease between the landlord and the assignor obligates the assignor to pay counsel fees to the assignee is rejected because only the landlord could seek counsel fees under that lease (from the tenant in the event of a default, and there has been no default).
Supreme Court; Satellite Gateway Communications, Inc. v. Musi Dining Car Co., Inc. et al, A-38 Sept. Term 1987; per curiam opinion; decided May 17, 1988.

121 N.J.L.J. Index Page 1107.

ATTORNEYS' FEES — MATRIMONIAL LAW

Defendant, an attorney himself, must have been aware at some point that his resistance to plaintiff's motion to take the children with her to Virginia, where her new husband works, would probably be unsuccessful (*Sastucci* has held that physical custody subject to visitation in a joint-custody decree is the same as sole custody for the removal guidelines of *Cooper*, which were correctly applied here in granting the motion), but it was plaintiff's decision to remarry and move to Virginia that initiated this expensive controversy and defendant had every right to resist the removal of his children; any sanction on the magnitude of his resistance would be error, and the court's decision that defendant should pay a little less than one quarter of plaintiff's attorneys' fees was a proper exercise of discretion.
Appellate Division; Christopher-Frederickson v. Christopher, A-1500-86T8; opinion by O'Brien, J.A.D.; decided March 4, 1988; approved March 18, 1988; in Opinions Approved column March 31, 1988.

121 N.J.L.J. Index Page 1113.

Counsel fees may not be assessed in a family action as a sanction for asserting an unsuccessful claim or raising an unsuccessful defense, and the trial court's order that the wife (who earns $20,000) pay $916.65 of the $1,765.40 counsel fee incurred by the husband (who earns $51,144) in opposing her motion for increased child support (which was dismissed for lack of specificity) is reversed.

In exercising its discretion on whether to award counsel fees in family actions, the court must consider the three *Williams* factors as follows: the party against whom the award would be assessed must have the financial ability to pay, and the party requesting the fees must be in financial need *and* must have been acting in good faith in asserting the claim or raising the defense that incurred them; the trial court erred here in awarding counsel fees (without findings on the husband's need or the wife's ability to pay) on the basis of the bona fides of the wife, *the party against whom the fees were assessed.*
Appellate Division; Darmanin v. Darmanin, A-5466-86T8; opinion by Brody, J.A.D.; decided April 22, 1988; approved April 30, 1988; in Opinions Approved column May 19, 1988.

121 N.J.L.J. Index Page 1460.

ATTORNEYS' FEES — MINORS — SETTLEMENTS

Reasonable fees for seeking support for a minor may be disbursed directly to the attorney, at the request of the infant's mother, out of the lump-sum settlement now held in his trust account.

Even assuming that the court had the authority to waive the bonding requirement, and even though the mother of the minor on whose behalf the $55,000 lump-sum support settlement was reached has well-intentioned goals of maximizing the investment rate and gaining flexibility in investing, the purpose of bonding is to insure against the loss of any of the principal and to guarantee a minimal yearly return equal to the 6% now available through the surrogate's office; petitioner must either post a bond or turn the money over to the surrogate for deposit, in accordance with R. 4:48A and N.J.S.A. 3B:15-16 and -17.
Chancery Division, Family Part; J.M.W. v. M.D. et al, FD-04-02599-86D; opinion by Natal, P.J.F.P.; decided June 11, 1987; approved October 27, 1987.

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ATTORNEYS — RIGHT OF CONFRONTATION

Counsel is disqualified from representing one of the defendants in this case because his prior representation of the State's key witness was substantially related to this prosecution; the defendant's offer to limit his right to cross-examine the witness would be inconsistent with the ethical administration of justice.

Law Division; State v. Catanoso et al, SGJ 168-86-9; opinion by Serata, J.S.C., decided October 6, 1987, approved December 21, 1987.

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BANKRUPTCY
(See also **Arbitration**)

Chapter 13 — Collectibility of Interest on Arrearages of Homeowner's Mortgage
In Re Capps, Commonwealth Eastern Mortgage Corporation (appellant). No. 87-1182, Decided Dec. 9, 1987. On appeal to the United States Court of Appeals for the Third Circuit from the United States District Court for the Eastern District of Pennsylvania.
Opinion by Stapleton, Circuit Judge.

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An order of the bankruptcy court approving a disclosure statement is an interlocutory order for which there is no right of appeal.

In re Elsinore Shore Associates et al; Civil No. 88-88; opinion by Brotman, U.S.D.J.; filed February 3, 1988. (Submitted for publication.)

121 N.J.L.J. Index Page 813.

BANKRUPTCY — DIVORCE

In an adversary proceeding brought by the trustee for leave to sell the marital home of the debtor/spouse and defendant pursuant to 11 U.S.C. § 363, the court abstained from hearing the matter where the Superior Court was in the process of dividing the marital assets pursuant to a divorce action.
In the Matter of Joseph Hursa, Jr.; No. 87-07081; opinion by Tuohey, U.S. Bankruptcy Judge; filed May 17, 1988.

121 N.J.L.J. Index Page 1359.

BILLBOARDS

N.J.S.A. 54:40-60(1) and (2) prohibit the issuance of an outdoor-advertising permit where the proposed sign would "injuriously affect any public interest" or "endanger the ... public safety, health or morals"; in granting the permit here, the Commissioner of the Department of Transportation applied an incorrect standard (requiring that the highway authority prove "such a unique set of circumstances that the travelling public would be endangered" and "a correlation" between billboards and the frequency of accidents) and unreasonably ignored expert testimony regarding the hazards of a billboard at the proposed site, and the application must be denied.
Appellate Division; Philadelphia Outdoor v. N.J. Expressway Auth. et al, A-671-86T6; opinion by Havey, J.A.D.; decided November 23, 1987; approved December 7, 1987.

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BOATS

The lender's perfected security interest in a marine vessel was not cut off by one who purchased the collateral from a merchant who "deals in goods of that kind," aware that the merchant was acting as a broker by selling the vessel on behalf of the owner; under these circumstances, the purchaser had the burden of conducting a search to disclose any security interests.
Law Division; Kusler v. Ciprlotti et al, L-50307-86; opinion by Callinan, J.S.C.; decided October 29, 1987; approved December 16, 1987.

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BREATHALYZER

A fair reading of *Romano* is that a certificate of ampoule spot-checking is required at a trial for drunk driving where the State introduces the results of breathalyzer tests (here, .16 and .17); because the trial court erred in ruling that such proof was not necessary and the State was in a position to have offered it, there will be a remand to the municipal court for an Evid. R. 8(1) hearing here (or, if defendant stipulates the validity of the random testing of ampoules described in the certificate, his conviction will be affirmed).
Appellate Division; State v. Dohme, A-4687-86T4; opinion by Dreier, J.A.D.; decided March 11, 1988; approved March 23, 1988; in Opinions Approved column March 31, 1988.

121 N.J.L.J. Index Page 1116.

BURDENS — DISCRIMINATION

N.J.A.C. 13:13-2.8 strikes the appropriate balance of the various interests in an employment-discrimination case involving a handicap: to invoke the safety defense as a justification for otherwise unlawful discrimination the employer must establish with a reasonable degree of certainty that it had reasonably concluded, after making an individualized assessment, that the employee's handicap posed a materially enhanced risk of substantial harm in the workplace; the failure to distinguish between the risk of a future epileptic seizure and of a future injury is crucial here, and the dismissal of plaintiff's complaint is reversed and the matter is remanded for further proceedings.

Once a handicapped employee in a discriminatory-discharge complaint establishes a prima facie case, the employer's burden varies depending on whether it advances a non-discriminatory reason for the discharge or seeks to establish the reasonableness of the otherwise discriminatory act; in the latter case, the burden of proof — as distinguished from the burden of production — shifts to the employer to prove that it had reasonably concluded that the employee's handicap precluded performance of the job.
Supreme Court; Jansen v. Food Circus Supermarkets, Inc., A-14 Sept. Term 1987; opinion by Pollock, J.; decided May 25, 1988.

121 N.J.L.J. Index Page 1209.

BURGLARY — THEFT

Burglary and attempted theft by an unlawful taking are separate and distinct offenses even though the "structure" broken into (here, a van) is also the "movable property" that the defendant attempted to steal.
Appellate Division; State v. Subin, A-5440-85T4; opinion by Michels, P.J.A.D.; decided January 11, 1988; approved January 22, 1988.

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CASINOS

Even though the waiver provision of N.J.S.A. 5:12-91e only applies to casino employees who perform services not directly related to casino operations, the Casino Control Commission (which did not find rehabilitation here under 5:12-91d) may not waive the registration disqualification of criminal conduct for respondent, a cook, without specifically finding that waiver is required in the interests of justice and would be consistent with the public policy of the Casino Control Act to insulate the gaming industry from criminals.
Appellate Division; Division of Gaming Enforcement v. Hannah, A-5399-85T6; opinion by Shebell, J.A.D.; decided September 21, 1987; approved November 30, 1987.

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The Casino Control Commission properly concluded that the Casino Control Act and its attendant regulations require that the sensitive function of receiving cash (or cash equivalents) for the redemption of outstanding counter checks (patrons' gaming checks not yet deposited in the bank for collection) is given exclusively to the cashier and must occur within the well-fortified and highly monitored confines of the cashier's cage.
Appellate Division; In re Adamar of New Jersey, Inc., A-2563-86T7; opinion by Havey, J.A.D.; decided January 19, 1988; approved February 9, 1988.

121 N.J.L.J. Index Page 610.

CDS

Even if the juvenile in the JINS shelter, and not defendant, a counsellor there, was the one who furnished the marijuana cigarette, the trial court correctly found that defendant had "distributed" it to the juvenile in violation of N.J.S.A. 24:21-19.9(1) and -26.b when they passed the lighted "joint" back and forth in sharing the smoking of it.
Appellate Division; State v. Roach, A-5418-84T4; opinion by Gaynor, J.A.D.; decided December 28, 1987; approved January 22, 1988.

121 N.J.L.J. Index Page 516.

CDS — SCHOOLS

Defendants, charged with possessing with the intent to distribute controlled dangerous substances within 1,000 feet of school property, have failed to show that N.J.S.A. 2C:35-7 and -12 are unconstitutional.
Law Division; State v. Morales et al, Inds. 87-08-1101 et al; opinion by Martin, J.S.C.; decided November 10, 1987; approved March 24, 1988; in Opinions Approved column March 31, 1988.

121 N.J.L.J. Index Page 1063.

CDS — SEARCH AND SEIZURE

Since the evidence is evanescent, the police may, without a search warrant, have an arrested defendant provide a urine sample where, as here, they have probable cause to believe that she is under the influence of a controlled dangerous substance; the minimal intrusion into her bodily-integrity and privacy rights is far outweighed by the legitimate demands of law enforcement, and the specimen should not have been suppressed.

Appellate Division; State v. Malik, A-4150-86T5; opinion by Baime, J.A.D.; decided November 17, 1987; approved December 2, 1987.

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CDS — SENTENCING

Under *Jersey City v. Martin* and in accordance with the reasonable and practical reading of N.J. Const. Art. IV, §VII, par. 5, there was no constitutional infringement in applying the parole-ineligibility provisions of the Code to CDS offenders without reenacting the Controlled Dangerous Substances Act as part of the Code.
Appellate Division; State v. Martin, A-3526-85T4; opinion by Furman, P.J.A.D.; decided December 24, 1987; approved January 22, 1988.

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CHECKS

The payor bank should have paid the check upon presentation because, even though it was not endorsed with the payee's name, it was endorsed with the payee's account number in the collecting bank, which guaranteed it; since the payor bank has shown no valid defense, its retention of the check beyond the deadline of N.J.S.A. 12A:4-302 (during which time the payor went into bankruptcy proceedings) is further reason why it is answerable for payment.

Appellate Division; Dienco, Inc. v. Security National Bank of N.J. et al, A-3473-86T8; opinion by Antell, P.J.A.D.; decided December 7, 1987; approved December 23, 1987.

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CHOICE OF LAW — CONSUMER FRAUD
(See also **Contracts**)

Arguably New Jersey (where plaintiff lives and his car was licensed) and Pennsylvania (where the contract and the repair and rebuilding work took place) have equally significant contacts in this case, but the scales are tipped in favor of New Jersey law because it mandates treble damages and attorney's fees for a violation of the Consumer Fraud Act, whereas in Pa. those assessments are discretionary; even though defendant acted in good faith and the work was worth the $6,000 he claimed, his failure to give plaintiff a written estimate and to get his written authorization for the work means that he wrongfully kept the car when plaintiff refused to pay the balance and storage charges demanded, and plaintiff is awarded treble the value of the car before it was rebuilt and treble his $2,000 down payment, plus costs and reasonable attorney's fees.

Law Division; Huffmaster v. Robinson et al, L-086806-85; opinion by Haines, A.J.S.C.; decided March 30, 1986; approved November 17, 1987.

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CHOICE OF LAW — FULL FAITH AND CREDIT

If a choice-of-law agreement is tainted, there is no basis for invoking the full faith and credit clause, and summary judgment on this New York default judgment is denied because, absent the consent in the chattel lease, New York would have no jurisdiction since no act at all took place there and plaintiff has offices in both New York and New Jersey; testimony should be taken on the reasonableness of the fine-print choice-of-law agreement and on whether defendant was aware of it when she signed what she assertedly believed was only a receipt.

Law Division; Fairfield Lease Corp. v. Liberty Temple Universal Church of Christ, Inc. et al, L 017127-87; opinion by Yanoff, J.S.C. (t/a); decided September 15, 1987; approved December 18, 1987.

121 N.J.L.J. Index Page 428.

CHOICE OF LAW — MATRIMONIAL LAW — URESA

Parties can agree that any issue concerning the enforcement of a support order or its modification must be presented in a given state, at least where the person seeking enforcement (here, the former wife, who continues to live in New York) and the subject of the support order (the child of the marriage, who resides with her) remain residents of the state where enforcement is permitted under the agreement (New York) and whose law is to govern pursuant to the agreement; the Family Part's holding that New York is the proper forum for this Uniform Reciprocal Enforcement of Support Act (URESA) action against the former husband, who now lives in New Jersey, is affirmed.

Appellate Division; Leavitt v. Leavitt, A-448-86T6; opinion by Stern, J.A.D.; decided December 3, 1987; approved March 11, 1988; in Opinions Approved column March 24, 1988.

121 N.J.L.J. Index Page 989.

CHOICE OF LAW — WORKERS' COMPENSATION

Wilson, recognized as the leading case on applying a foreign state's exclusive-remedy provision, continues to represent an accurate balancing of the interests involved; the dismissal is affirmed here, where New Jersey has no strong countervailing interest in allowing a tort suit by a New Jersey employee of a New Jersey subcontractor against a South Carolina general contractor such as defendant that would justify undermining the foundation of the workers' compensation statute of South Carolina, which (unlike New Jersey) renders both the subcontractor and the general contractor directly responsible for providing workers' compensation coverage and, in return, immunizes both from tort liability.

Supreme Court; Eger v. E.I. du Pont De Nemours Co., A-48 Sept. Term 1987; opinion by Handler, J.; dissent by Stein; decided April 20, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1108.

CIVIL PROCEDURE
(See also **Attorneys' Fees**)

Injunction under Fed. R. Civil P. 11. *Gagliardi, appellant, v. McWilliams et al.*, Nos. 86-3725 and 87-3056, Appeal from the U.S. District Court for the Western District of Pennsylvania to the U.S. Court of Appeals for the Third Circuit, Slip Opinion Dec. 2, 1987.
Before: Higginbotham and Sloviter, Circuit Judges, and Van Dusen, Senior Circuit Judge. Per curiam opinion.

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An efficient calendar must be recognized as a means to the end of furthering the interests of justice, and usually an R. 4:9-1 motion to amend should only be denied in the "interests of justice" where there would be prejudice to another party; here, where defendants apparently did not feel that it would prejudice them to add the driver of the car that allegedly caused their sudden stops, injuring plaintiff, and plaintiff's motion was not dilatory, denying it was an abuse of discretion.

Appellate Division; Brower v. Gonnella et al, A-3018-86T1; opinion by Shebell, J.A.D.; decided December 31, 1987; approved January 22, 1988.

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Requests for "in limine" rulings should be granted only sparingly and with the same caution as requests for dismissals on opening statements.

Appellate Division; Bellardini v. Krikorian, A-4272-86T8; per curiam (Judges Petrella and Ashbey) opinion; decided January 7, 1988; approved February 18, 1988.

121 N.J.L.J. Index Page 691.

Motion for costs deemed collateral to judgment and not proper to Rule 59 motion requiring new notice of appeal.

Buchanan v. Standips, 87-133, U.S. Supreme Court on appeal from 5th Circuit, March 21, 1988.

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Order denying motion to dismiss or stay when pending similar state suit exists is not appealable.

Gulfstream Aerospace Corp. v. Mayacamas Corp., 86-1329, U.S. Supreme Court on appeal from 9th Circuit, March 22, 1988.

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Where facts mandating mitigation are as evident as they were here, the bench-trial judge is under no less of an obligation than he would be in charging a jury to apply the proper method of computing damages, regardless of whether the defendant has raised the specific issue of mitigation.

Appellate Division; The Khiaik Company, Inc. v. Hirschfeld, A-532-86T1; opinion by Dreier, J.A.D.; decided February 16, 1988; approved March 3, 1988.

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Rule 11 — Wrongful Discharge From Employment.

Gaiardo v. Ethyl Corporation (appellant), No. 87-5248.

On appeal to the United States Court of Appeals for the Third Circuit from the United States District Court for the Middle District of Pennsylvania.
Opinion by Weis, Circuit Judge.

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Prior Judgment Clause under Fed. R. Civ. P. 60(b)(5).

Harris v. Martin, No. 86-5869. Appealed from the U.S. District Court for the Middle District of Pennsylvania to the U.S. Court of Appeals for the Third Circuit. Slip opinion Nov. 30, 1987.
Before: Sloviter, Stapleton, and Hunter, Circuit Judges. Opinion delivered by Stapleton, Circuit Judge.

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CIVIL PROCEDURE — CIVIL RIGHTS

The U.S. Supreme Court has interpreted section 1983 to limit the rights of plaintiffs and to encourage summary disposition of the actions as a matter of law at least where they arise out of an alleged unlawful arrest, search or seizure by a law-enforcement officer, who can defend a section 1983 claim by establishing that probable cause existed or that a reasonable officer could have believed that it existed; here, the trial court properly determined that a reasonably well-trained police officer, reviewing the facts with an assistant prosecutor in this possible child-abuse case, could have believed that she had probable cause to arrest plaintiff, although the complaint against him was, on further investigation, voluntarily dismissed.

Supreme Court; Kirk v. Newark, A140/41 Sept. Term 1986; opinion by Pollock, J.; decided January 15, 1988.

121 N.J.L.J. Index Page 501.

CIVIL PROCEDURE — DAMAGES

Trial courts are cautioned against granting summary judgment on a meager record where the ruling sought would have a broad social and/or legal effect.

The exculpatory-damage clause in this commercial-advertising case should not have been declared void as unconscionable before plaintiff showed that the damages it permitted were inadequate; after the Law Division's opinion resulting in the interlocutory order voiding the clause was published, another trial judge correctly found that plaintiff failed to show any damages resulting from two errors in his listing by defendant.

Appellate Division; Tannock v. N.J. Bell Telephone Co., A-3015-86T1; per curiam (Judges Coleman and Havey) opinion; decided January 28, 1988; approved February 9, 1988.

121 N.J.L.J. Index Page 861.

CIVIL PROCEDURE — FICTITIOUS DEFENDANTS — LIMITATIONS OF ACTIONS

There is no rule or logical reason requiring multiple "John Does" in order to substitute multiple named defendants when their identities have been ascertained and, as long as there is still one "John Doe" defendant, plaintiff may substitute three named defendants.

Since the corporate defendant did not tell plaintiff the names of the alleged individual tortfeasors until shortly before the statute of limitations ran, his motion to substitute them for "John Doe" after it ran was not inordinately delayed; since defendants have not been prejudiced, his motion is granted.

Law Division; Fede v. Clara Maass Hospital et al, L-044252-86; opinion by Villanueva, J.S.C.; decided September 25, 1987; approved November 4, 1987.

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CIVIL PROCEDURE — INSURANCE

The Law Division decision authorizing the injured plaintiff to withdraw the money that the now-insolvent insurer had deposited with the court, pursuant to R. 4:57-1, is affirmed; the deposit was made without any expectation that the funds would be returned, and the Uniform Insurers Liquidation Act includes as assets vested in a receiver of an insolvent insurer property *not* deposited "for the ... benefit of specified persons."

Appellate Division; Kostick v. Janko et al, A-527-87T7; per curiam (Judges Petrella, Dreier and Baime) opinion; decided March 4, 1988; approved March 18, 1988; in Opinions Approved column April 7, 1988.

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CIVIL PROCEDURE — SELF-INCRIMINATION

Whether to stay civil proceedings when related criminal proceedings are pending and defendants have invoked the Fifth Amendment rests in the sound discretion of the trial court; that discretion was not abused here, where the ruling limited the stay of the civil case brought by the State to the completion of the trial phase of the indictment for the unlawful sale of securities brought against some of the civil defendants and gave the State leave to apply for modifications if it set forth how it intended to proceed as to each defendant.

Appellate Division; State of N.J. et al v. Kobrin Securities, Inc. et al, A-5783-86-T5; opinion by Ashbey, J.A.D.; decided November 19, 1987; approved December 2, 1987.

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CIVIL PROCEDURE — SUBROGATION

Just as the insured would have had a trust obligation to her insurer for any sum in excess of her actual loss that she might have recovered from the tortfeasor, so does the subrogating insurer have a trust obligation to the insured in respect of the difference between the insurance payment and the greater amount of her actual loss; since the circumstances here apparently include such elements as unconscionability in the 80/20 subrogation agreement, its violation of public policy and the implicit fiduciary obligation, the misrepresentations by which it was procured, the trial court's denial of a fair opportunity to be heard, an inequitable result and a reasonably prompt (although procedurally erroneous) challenge, relief from the distribution order is granted under R. 4:50-1 (f) and the matter is remanded.

Appellate Division; Culver v. Insurance Co. of North America, A-3729-86T1; opinion by Prender, P.J.A.D.; decided December 1, 1987; approved December 16, 1987.

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CIVIL RIGHTS
(See also **Civil Procedure** and **Discrimination**)

Plaintiff's failure to satisfy the notice provisions of the Tort Claims Act does not bar her claim of discrimination brought under the Civil Rights Act and the New Jersey Law Against Discrimination; the University of Medicine and Dentistry of New Jersey is a "person" within the meaning of §1983 and, therefore, may be liable for civil rights violations under that statute.

Supreme Court; Fuchilla v. Layman et al, A-122; Sept. Term 1986; opinion by Pollock, J.; concurring opinion by Handler, J.; decided February 8, 1988.

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COLLATERAL ESTOPPEL

Later scientific discoveries that cast doubt on prior findings of scientific facts deprive those findings of collateral-estoppel effect; also, since the law of New Jersey permitted the fact issue (whether a drug taken by plaintiff's mother to prevent miscarriage during her pregnancy with him caused the underdevelopment of his left arm) to be tried more fairly than the law of Utah, where hearsay was allowed and the jury found against defendant; collateral estoppel was not a bar to a retrial of the issue, and the judgment for defendant entered on the jury's finding that the drug did not cause the harm complained of is affirmed.

Appellate Division; Zwaig v. E.R. Squibb & Sons, Inc. et al, A-3800-85T1; opinion by Brody, J.A.D.; decided January 7, 1988; approved January 28, 1988.

121 N.J.L.J. Index Page 611.

COLLATERAL ESTOPPEL — MUNICIPAL LAND USE — RES JUDICATA

A claim of res judicata or collateral estoppel should rarely, if ever, be treated in a summary fashion by a municipal board; here, where the 1978 partial site-plan approval was not expressly conditioned on a restriction on further development of the applicant's property, the board of adjustment did not satisfy its burden of establishing that it had intended to preclude all future development and the trial court erred in according the 1978 resolution preclusive effect.

Appellate Division; Allied Realty, Ltd. v. Borough of Upper Saddle River et al, A-2950-86T7; opinion by Baime, J.A.D.; decided November 30, 1987; approved December 14, 1987.

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COMMERCE CLAUSE — TAXES — TRUCKS

B&L must yield to supervening doctrinal development; taxes affecting interstate commerce must effectuate a legitimate public interest and the Counterpart Fee Act, a retaliatory tax on trucks operating in New Jersey that are registered in states that impose "third-structure" taxes on trucks registered in N.J., is unconstitutional.

Appellate Division; Private Truck Council of America, Inc. et al v. State of New Jersey et al, etc., A-1145-85T1; opinion by Bilder, J.A.D.; decided March 31, 1987; approved December 2, 1987.

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COMPLAINTS (See **Arrests**)

COMPOUNDING

The Code goes further than common law and predecessor statutes to provide that one may compound a crime not only by receiving a benefit for thwarting a prosecution but also by *conferring* a pecuniary benefit on a victim for an agreement not to report an offense or seek its prosecution, N.J.S.A. 2C:29-4; the evidence presented here may constitute witness tampering under 2C:28-5a but, since the additional element of agreeing to pay is present, the crime of compounding can also be established.

Law Division; State v. Jardim et al, Ind. 87-05-0585; opinion by Beglin, A.J.S.C.; decided January 15, 1988; approved March 10, 1988; in Opinions Approved column March 24, 1988.

121 N.J.L.J. Index Page 994.

CONDEMNATION
(See also **Attorneys' Fees**)

The Dept. of Transportation's filing of an alignment-preservation map covering plaintiff's property did not, by itself, constitute intense governmental regulation, nor did it deprive plaintiff of his right to derive a beneficial use from his property, and his inverse-condemnation complaint was properly dismissed as failing to state a claim on which relief could be granted (if he had invoked N.J.S.A. 27:7-67(a)(1), development of his property would have been frozen for only 165 days).

Appellate Division; Rieder v. DOT et al, A-3560-86T8; opinion by Baime, J.A.D.; decided December 10, 1987; approved January 11, 1988.

121 N.J.L.J. Index Page 425.

Although strict compliance with R. 4:73-1 (which requires that the complaint set forth information about the appraised value of the land to be acquired and the valuation method relied on) must be demanded, the sanction of dismissal, without any inquiry into whether the opposing party was prejudiced, constitutes a draconian remedy particularly where, as here, the error was wholly inadvertent and was cured shortly after the complaint was filed.

Although the "bona fide negotiations" requirement of N.J.S.A. 20:3-6 may be satisfied where, as here, the parties have engaged in discussion and reached an impasse on a subject other than price, the county's failure to supply to defendants prior to litigation its appraisal and the manner in which the offering price was calculated constitutes such a statutory dereliction as to compel the dismissal of this complaint.

Appellate Division; Monmouth County v. Whispering Woods at Bamm Hollow, Inc. et al, et , A-2811-86T7; opinion by Baime, J.A.D.; decided October 16, 1987; approved January 15, 1988.

121 N.J.L.J. Index Page 474.

The county could not assert that the property owners' failure to accept its offer to purchase within the time period fixed in the offer was "conclusive proof of the inability of the condemnor to acquire the property ... through negotiations" under N.J.S.A. 20:3-6 here, where the county filed suit three days after receiving the owners' response containing credible evidence that the property was worth substantially more than the amount offered and inviting further discussion; in order to apply the "conclusive proof" rule, the written offer must be preceded by bona fide negotiations.
Appellate Division; Morris County v. Weiner et al, A-3386-86T1; opinion by Antell, P.J.A.D.; decided February 18, 1988; approved March 3, 1988.

121 N.J.L.J. Index Page 866.

CONDEMNATION — TORT CLAIMS ACT

Plaintiff, who asserts no cause of action for nuisance, cannot circumvent the Tort Claims Act and *Birchwood* by asserting a cause of action for inverse condemnation caused by drainage; the deteriorating pipe under her property does not belong to the township and was installed by her predecessor in title for his own benefit, and neither the township nor the county is liable for any holes on plaintiff's property.
Law Division; Johnson v. Essex Cty. et al, L-051963-84E; opinion by Villanueva J.S.C.; decided April 30, 1987; approved November 30, 1987.

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CONDOMINIUMS

The tenant never requested "comparable housing" pursuant to N.J.S.A. 2A:18-61.11a, although informed of that right in the notice he received (pursuant to -61.2) that his housing unit was being converted to the condominium form of ownership; therefore, the landlord was not required to offer it.

The landlord's continuing to collect rent from the tenant for two years after the three-year notice period for condominium conversion had expired constituted a waiver of the right under N.J.S.A. 2A:18-61.1K to evict upon the expiration of that period, and it cannot evict him now absent one of the grounds in -61.1.
Law Division; Fairken Associates v. Hutchin, I.T 801808; opinion by **Fast**, J.S.C.; decided December 18, 1987; approved February 24, 1988.

121 N.J.L.J. Index Page 927.

CONFLICTS OF INTEREST

Attorneys of the Rutgers Law School Constitutional Litigation Clinic, who are either law school professors or staff attorneys employed by Rutgers, may not represent a litigant before the Council on Affordable Housing (COAH) because the Conflicts of Interest Law prohibits state employees from representing "*any* person or party other than the state" in a matter before a state agency and COAH is not one of the agencies specifically exempted in N.J.S.A. 52:13D-16c.
Appellate Division; In re Rutgers Attorneys, A-2991-86T7; opinion by **Petrella**, P.J.A.D.; decided February 3, 1988; approved February 18, 1988.

121 N.J.L.J. Index Page 811.

CONSORTIUM (See Attorneys' Fees)

CONSTITUTIONAL LAW

Foreign embassy anti-demonstration laws deemed partially unconstitutional.
Boos v. Barry, 86-803, U.S. Supreme Court on appeal from D.C. Circuit, March 22, 1988.

121 N.J.L.J. Index Page 814

CONSUMER FRAUD (See Choice of Law)

CONTEMPT — PUBLIC EMPLOYMENT (See also Attorneys)

Although the Legislature is not prohibited by N.J. Const., Art. 1, par. 19 from granting public employees the right to strike, N.J.S.A. 34:13A-1 et seq. does not reflect a legislative intent to depart from the common-law rule; the restraints entered against the work stoppage by the employees of plaintiff board of education are affirmed.

It was appropriate that the employees of the board of education not receive pay for the days on which they were illegally absent from their jobs, and be ordered to reimburse the board for all of the expenses incurred as a result of the strike (for substitute teachers, legal fees, etc.) under R. 1:10-5, but the fines of $500 each for not working October 16 and two days gross pay for each day thereafter are vacated because defendants were not adjudicated in contempt pursuant to R. 1:10-2 and -4.
Appellate Division; Passaic Tp. Bd. of Education v. Passaic Tp. Ed. Ass'n et al, A-0042-86T7; opinion by **O'Brien**, J.A.D.; decided December 16, 1987; approved February 9, 1988.

121 N.J.L.J. Index Page 688.

CONTRACTS — CHOICE OF LAW

The introductory phrase that the contract between the general contractor and the subcontractor was "made ... under Indiana law" cannot reasonably be construed as a direction that Indiana law is to govern; since the high-rise building was to be constructed in New Jersey, following a complex set of N.J. regulations, this case is controlled by New Jersey law.
Appellate Division; McCabe v. Great Pacific Century Corp. et al, A-4211-86T5; opinion by Skillman, J.A.D.; decided February 1, 1988; approved February 18, 1988.

121 N.J.L.J. Index Page 810.

CONTRACTORS — INDEMNIFICATION — RETROACTIVITY

The 1983 amendment to N.J.S.A. 2A:40A-1, which removed the 1981 prohibition against all indemnification agreements in construction contracts and only invalidates clauses that hold harmless an indemnitee whose sole negligence caused the injury, was correctly given retroactive application to this 1982 contract.

The mere allegation that the indemnitor's work caused the injury complained of did not trigger the obligation to defend here, where the agreement did not so provide; insurance cases are distinguished.
Appellate Division; Grippo v. Schronell and Co. et al, A-2974-86T8; opinion by Coleman P.J.A.D.; decided February 29, 1988; approved March 11, 1988; in Opinions Approved column March 24, 1988.

121 N.J.L.J. Index Page 1058.

COUNTIES — COURTS

The impasse between Essex County and the Essex County Assignment Judge regarding the county's judicial budget for 1987 is resolved by adopting the recommendation of the R. 1:33-9 panel (with three limited exceptions); with greater awareness of each other's problems, county and judiciary officials working together will be able to improve the budgeting process — the public deserves no less.
Supreme Court; In re the 1987 Essex County Judicial Budget Impasse, E-15 Sept. Term 1987; opinion by **Garibaldi**, J.; decided November 25, 1987.

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COUNTIES — JAILS

Although the manner of appointment to the office of warden of the Essex County Jail has been changed by the county-executive plan, its importance has not been diminished, and the newly-elected county executive's power to remove him does not violate plaintiff's First Amendment rights under *Brant*.
Law Division; Butler v. Amato et al, L-049914-87; opinion by **Yanoff**, J.S.C. (t/a, ret.); decided May 7, 1987; approved September 17, 1987.

121 N.J.L.J. Index Page 430.

COUNTIES — ENVIRONMENTAL PROTECTION — MUNICIPALITIES

An agreement between a county and a municipality requiring the consent of the latter to establish a trash-transfer station in the municipality is unenforceable because the county is not authorized to surrender its power under the Solid Waste Management Act to site trash-transfer stations.
Appellate Division; City of Newark, et al v. Essex County Board of Chosen Freeholders, A-5288-86T5; opinion by Dreier, J.A.D.; decided December 16, 1987; approved January 11, 1988.

121 N.J.L.J. Index Page 473.

COUNTIES — PROSECUTORS

The remedy of a writ in lieu of mandamus is only available where the ministerial duty is clear and wholly free of the element of discretion, so the assignment judge's order directing the county executive to process additional personnel forms for the prosecutor's office, which would facially produce an over-expenditure, is reversed; if the funding is inadequate for the prosecutor, his remedy is either a *Bigley* application or an in lieu application based on a clear evidential showing that the requested level of staffing is assured within the appropriated budget, based on additional state or federal grants and actual attrition.
Appellate Division; Tate v. Amato, A-4388-86T5; opinion by Landau, J.A.D.; decided October 5, 1987; approved October 16, 1987.

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COURTS — DISCOVERY (See also Counties)

A local court has no authority to promulgate rules that abrogate or modify rules promulgated by the Supreme Court; a "local rule" that precluded a party from moving to compel a delinquent party to appear for depositions, only permitting a motion to dismiss the complaint or to strike an answer for failure to appear for depositions, invalidly circumscribed judicial discretion in disposing of discovery motions.
Appellate Division; Cunningham v. Rummel et al, A-4895-86T8; opinion by Havey, J.A.D.; decided February 9, 1988; approved March 3, 1988.

121 N.J.L.J. Index Page 806.

CREDITORS' RIGHTS (See Attorneys' Fees)

CRIMINAL LAW

Pursuant to N.J.S.A. 9:6-1, -3 and -8.21, even if he did not participate in the beating by the mother, defendant had a duty to prevent his little son's painful death.

Appellate Division; State v. Bass, A-836-83T4; opinion by **O'Brien**, J.A.D.; decided September 22, 1987; approved October 9, 1987.

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The fact that defendant did not own the car he was driving is not necessarily relevant to the issue of possession of the cocaine found in the trunk since he possessed the trunk key and had control of the car; by not testifying at trial or offering other proof to negate his knowledge of the cocaine, defendant did not rebut the natural inference of knowing possession.
Appellate Division; State v. Binns, A-3738-86T4; opinion by Dreier, J.A.D.; decided February 18, 1988; approved March 3, 1988.

121 N.J.L.J. Index Page 868.

Travel Act-Mail Fraud.
United States v. Piccolo (appellant), Third Circuit Court of Appeals, No. 87-5262, filed Dec. 21, 1987.
On appeal from the United States District Court for the District of New Jersey.
Opinion by Seitz, Circuit Judge.

121 N.J.L.J. Index Page 460.

CRIMINAL LAW — FREE PRESS

Defendant's status as a journalist cannot protect her from the application of the criminal laws forbidding the false impersonation of a public official, especially where, as here, she allegedly deceived the vulnerable mother of a homicide victim by identifying herself as a county official, a "lady from the morgue," in order to ask personal questions.
Appellate Division; State v. Canter, A-5959-85T4; opinion by Dreier, J.A.D.; decided November 23, 1987; approved December 7, 1987.

121 N.J.L.J. Index Page 204.

CRIMINAL PROCEDURE — RETROACTIVITY (See also Alibi)

Defendant, who did not challenge the validity of the warrantless arrest in his home before the trial court and failed to continue his direct appeal, allowing the judgment of conviction for murder to become final, may not use a post-conviction relief proceeding to collaterally attack his conviction by asserting a violation of his Fourth Amendment rights under *Payton v. New York*; the limited retroactivity of *Payton* is not applicable here because, even though defendant's case was subject to direct review by the United States Supreme Court as of April 15, 1980, the date *Payton* was decided, he did not file a petition for certiorari after being denied certification by the New Jersey Supreme Court.
Appellate Division; State v. Jenkins, A-5198-86T5; opinion by Coleman, P.J.A.D.; decided November 25, 1987; approved December 14, 1987.

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CRIMINAL PROCEDURE — SELF-INCRIMINATION

It was a mistaken exercise of discretion for the trial judge to apprise the defense witness, who was about to voluntarily testify that he had handed the gun to defendant to prevent an imminent attack, that he would be subject to criminal charges and to advise him of his privilege against self-incrimination; the hazard of incrimination was remote and the protection was outweighed by the interests of the litigant denied the benefit of the witness's testimony.

The prosecutor had no standing to object to the defense witness's testimony on the basis of his privilege against self-incrimination; assuming that his motive was solicitude for the witness, he had the right to seek immunity and thus could have avoided the suppression of the witness's testimony.
Appellate Division; State v. Johnson, A-4042-85T4; opinion by Baime, J.A.D.; decided February 22, 1988; approved March 4, 1988; in Opinions Approved column March 17, 1988.

121 N.J.L.J. Index Page 917.

DAMAGES (See also Civil Procedure)

Paladino v. Campos was addressing claims for pain and suffering when it spoke of "awareness ... of the loss"; an award for disability and impairment compensates for the interruption of function that diminishes the capacity for physical and mental activity, and does not depend on the capacity to perceive the curtailment of one's active life.
Appellate Division; Lanzet v. Greenberg et al, A-5416-85T1; opinion by Antell, P.J.A.D.; decided February 11, 1988; approved March 3, 1988.

121 N.J.L.J. Index Page 811.

DAMAGES — DISCRIMINATION

The trial court's determination not to allow punitive damages in this case (because defendant admitted having broken a work rule once) was inconsistent with its conclusion that the jury's verdict for plaintiff on liability was unimpeachably premised on a finding that his discharge was racially motivated; the issue of punitive damages (which may be awarded under the Law Against Discrimination as well as under the N.J. and U.S. Constitutions) should have been presented to the jury to consider along with the issue of compensatory damages and, since the unwarranted half million in compensatory damages may have been based on a desire to punish defendant's egregious conduct, the new trial as to damages was properly granted.
Appellate Division; Jackson v. Consolidated Rail Corp., A-5878-86T5; opinion by Stern, J.A.D.; decided March 10, 1988; approved March 23, 1988; in Opinions Approved column March 31,1988.

121 N.J.L.J. Index Page 1160.

DAMAGES — TORT CLAIMS ACT

N.J.S.A. 59:9-3b, which mandates that in any case involving a public entity a settlement by one tortfeasor must be deducted pro tanto from a judgment against another tortfeasor, applies whether or not the public entity is the non-settling party; here, the $55,000 award must be reduced (after the 10% deduction for plaintiff's fault) by the $20,000 the township paid plaintiff in settlement, not by its 70% of fault allocated by the jury, and the private tortfeasor, who was found 20% at fault, must pay plaintiff $29,500.
Appellate Division; Murray v. Nicol, A-5588-86T8; opinion by Baime, J.A.D.; decided April 7, 1988; approved April 20, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1459.

DEATH BY AUTO (See Aggravated Manslaughter)

DEATH PENALTY — RESENTENCING PROCEEDINGS

A defendant sentenced to life imprisonment at the original trial cannot be sentenced to death at the resentencing proceeding.

If the sentencing jury in the first trial specifically rejects an aggravating factor or an appellate court finds that the State failed to establish by sufficient evidence the existence of an aggravating factor at the original trial, the aggravating factor, or that part of the aggravating factor rejected by the jury, cannot be used at the resentencing proceeding.

If the sentencing jury found an aggravating factor at the original trial, old and new evidence relevant to that aggravating factor may be admitted at the resentencing proceeding.

If the sentencing jury found proof of aggravating factor c(4)(a) at the original trial, or even if there was no c(4)(a) factor introduced at the original trial, evidence of a defendant's interim murder conviction may be admitted at resentencing to establish aggravating factor c(4)(a).

With regard to aggravating factors other than c(4)(a), only in extremely rare occasions will the State be allowed to submit evidence of a new aggravating factor, and only on proof that such evidence was unavailable to the State at the time of the original trial.

At a resentencing proceeding the defendant may submit new evidence on mitigating factors previously found and any evidence of any new mitigating factor; the State obviously may offer appropriate rebuttal evidence, but will be precluded from introducing a new aggravating factor under the guise of producing rebuttal evidence.

Supreme Court; State v. Biegenwald, A-171 Sept. Term 1987; opinion by **Garibaldi**, J.; concurrence by **O'Hern**, J.; dissent by **Handler**,

J.; decided June 20, 1988.

121 N.J.L.J. Index Page 1449.

DEFAMATION
(See also **Attorneys**

Not only should the building inspector have been considered a public official and a public figure in his action for defamation, the *Times* "actual-malice" (which is *not* "ill-will") standard should have been applied here since the letter by the mayor to the electorate during a recall election explaining why plaintiff had been discharged clearly qualified as a matter of public concern (at the very least, actual malice, to be proven with "convincing clarity," would be required to support the punitive-damage award); on remand, if plaintiff proves the falsity of defendant's letter, the jury must decide whether defendant had knowledge of that falsity or had recklessly disregarded information questioning what he had written.

Appellate Division; Vassalo v. Bell, A-70-86T1; opinion by Petrella, P.J.A.D.; decided December 3, 1987; approved December 16, 1987.

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Absent exceptional circumstances, the mere allegation that a plaintiff knows a criminal is not defamatory; since the reasonable meaning of the sentence in defendants' book (about the crimes committed against plaintiff and others) to which plaintiff objects is that her interest in a "joyride" stemmed from companion, not from criminal involvement in drug activity, the trial judge properly found that, as a matter of law, it was not reasonably susceptible of a defamatory meaning.

Supreme Court; Romaine et al v. Kallinger et al, A-17 Sept. Term 1987; opinion by Handler, J.; dissent by O'Hern, J.; decided February 18, 1988.

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DEFAMATION — LAW OF THE CASE

Where a decision of the Supreme Court has substantially changed the law governing the principal claim of a case (here, expanding the class of those who must prove "actual malice" in a defamation action) an earlier Appellate Division ruling in the case on a related claim should not be independently enforced on remand; this matter should be retried, and the summary judgment is reversed.

Appellate Division; Sisler et al v. Gannett Co., Inc. et al, A-4490-86T7; opinion by Dreier, J.A.D.; decided December 31, 1987; approved January 22, 1988.

121 N.J.L.J. Index Page 517

DEFAMATION — TORTIOUS INTERFERENCE

An insurer that described an insured's appraiser as not "competent and disinterested" was entitled to a qualified privilege of immunity from defamation and tortious-interference claims where the words were uttered in the course of, and with some relation to, an appraisal proceeding; although appraisal proceedings do not have sufficient safeguards against defamation to confer absolute immunity, they have some of the relevant functional characteristics of quasi-judicial proceedings, they should be encouraged as an alternate means of dispute resolution, and there is a similar public interest in free expression of the participants without fear of retribution.

Appellate Division; Binkowitz v. Allstate Ins. Co. et al, A-3578-86T7; opinion by Cohen, J.A.D.; decided February 4, 1988; approved February 16, 1988.

121 N.J.L.J. Index Page 690.

DE MINIMIS

The 20-year-old defendant's having taken one sip from a cup of beer legally purchased by a friend at a church fair was properly dismissed by the assignment judge as a de minimis infraction of the law forbidding underaged drinking.

Appellate Division; State v. Zarrilli, A-3067-86T5; opinion by Antell, P.J.A.D.; decided October 26, 1987; approved November 10, 1987.

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DISCOVERY — EVIDENCE
(See also **Courts**)

Since the interrogatory requested the expert's opinion, as opposed to factual information within plaintiffs' knowledge, the expert's report cannot be admitted into evidence as plaintiffs' adoptive admission.

Since plaintiffs' expert witness, on the basis of whose deposition the manufacturer of the inserted device settled with plaintiffs, is out of state and all the parties to the litigation were at and had a right to participate in his deposition, the requirements of R. 4:16-1(c) have been met; defendant doctor may introduce that deposition in evidence in his cross-claim against the manufacturer.

Law Division; Mehalick v. Schwartz et al, L-96098-85; opinion by Barisonek, J.S.C.; decided December 16, 1987; approved February 9, 1988.

121 N.J.L.J. Index Page 738.

DISCRIMINATION — FIREFIGHTERS — PENSIONS — POLICE
(See also **Alcoholism, Burdens, Civil Rights, Damages** and **Employment**)

To the extent that plaintiffs, who are officers in police and fire departments, are not primarily and directly involved in the duties referred to in the exceptions to the Age Discrimination in Employment Act (firefighting or the apprehension of criminals) they are not subject to the mandatory early-retirement (at age 65) provisions of the New Jersey pension acts (the federal inclusion in those exceptions of firefighters and law-enforcement officers "transferred to a supervisory or administrative position" is construed here as not applying to bona fide promotions).

Appellate Division; Boylan et al v. State of New Jersey et al, etc.; A-4578-86T5; opinion by Petrella, P.J.A.D.; decided January 20, 1988; approved February 9, 1988.

121 N.J.L.J. Index Page 687.

DOUBLE JEOPARDY — JURIES

No vital interest of a defendant is affected where a juror has to be dismissed for cause after the opening statements but before any evidence has been presented so long as the replacement juror is completely acquainted with the opening statements (here, by giving the parties the option of either reopening or having the statements read back by the reporter).

Appellate Division; State v. Boyar, A-5045-84T4; opinion by Dreier, J.A.D.; decided December 8, 1987; approved December 16, 1987.

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DOUBLE JEOPARDY — DRUNK DRIVING

Although the Law Division judge erroneously acquitted defendant, after a trial de novo on the municipal court record, of the second of two drunk driving offenses that occurred within two hours of each other (they were not a "single event"), the double-jeopardy clause bars this appeal by the State.

Appellate Division; State v. Costello, A-6103-86T5; opinion by King, P.J.A.D.; decided March 31, 1988; approved April 19, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1398.

DRUNK DRIVING

There is no duty under N.J.S.A. 39:4-50 et seq. for the police authorities to arrange for the blood tests that those accused of drunk driving have a right to take; here, where defendant's two breathalyzer readings were .13% half an hour after his arrest, and two hours later (when he found a hospital that would give him the blood test without police orders) it still showed .10%, his conviction was not unjust or contrary to the legislative intent.

Appellate Division; State v. Weber A-5871-85T4; opinion by Shebell, J.A.D.; decided June 18, 1987; approved October 2, 1987.

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DRUNK DRIVING — MOTOR VEHICLES

The director of the New Jersey Division of Motor Vehicles had the authority to suspend appellant's New Jersey driver's license for 720 days and to impose an insurance surcharge of $1,000 a year for three years after appellant, a New York resident with both New York and New Jersey driver's licenses, was convicted of drunk driving in New York; appellant's own violation of the Interstate Driver-License Compact requirement that he surrender a license issued by one state before obtaining a license from another state cannot deprive the director of that authority.

Appellate Division; In re Johnson, A-3601-86T8; opinion by Skillman, J.A.D.; decided January 11, 1988; approved March 10, 1988; in Opinions Approved column March 24, 1988.

121 N.J.L.J. Index Page 989.

DRUNK DRIVING — RIGHT TO COUNSEL

The right to counsel is mandated when a defendant faces the loss of driving privileges, and defendant's first conviction for drunk driving, where he was not represented by counsel, cannot be used to enhance the penalty for his second conviction.

Law Division; State v. Laurick; T-18755; opinion by Haines, A.J.S.C. (sitting as municipal court judge); decided August 17, 1987; approved December 8, 1987.

121 N.J.L.J. Index Page 612.

DYFS — SELF-INCRIMINATION

Because of the close working relationship between the Division of Youth and Family Services and the Middlesex County Prosecutor's Office, the DYFS caseworker who conducted a custodial interview pursuant to N.J.S.A. 9:6-1 et seq. of defendant, [illegible] as charged with sexually abusing his daughters, must be equated with a law-enforcement officer for purposes of *Miranda*.

There is no reason to require DYFS caseworkers to administer additional *Miranda* warnings where the police would not be under a concomitant duty; here, where defendant was properly advised of his *Miranda* rights by the police when he was arrested and knowingly waived them, and again did not request an attorney or invoke his right to remain silent when the DYFS caseworker (aware that he had been advised of his rights) went to interview him in custody the following day, it was unnecessary for her or anyone else to readvise him and the denial of his motion to suppress the statement he gave her is affirmed.

Appellate Division; State v. Helewa, A-5135-86T5; opinion by Michels, P.J.A.D.; partial dissent by Shebell, J.A.D.; decided February 18, 1988; approved March 3, 1988.

121 N.J.L.J. Index Page 919.

EDUCATION

Seniority is a concept used by the Commissioner of Education to rank the job rights of tenured teachers; N.J.S.A. 18A:28-10 does not authorize regulatory dilution of tenure rights by affording non-tenured teachers seniority, and the State Board of Education erred in permitting a non-tenured teacher to retain a full-time position while a tenured teacher holding a certificate in the same field was reduced in hours to a part-time position, in spite of any alleged seniority.

Appellate Division; Bednar v. Westwood Board of Education, A-2419-86T7; opinion by Cohen, J.A.D.; decided November 24, 1987; approved December 11, 1987.

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N.J.S.A. 18A:28-5 requires that a tenured teacher whose position was eliminated but who accepted a part-time position in the same instructional area should be paid proportionately, as if she were a part-time teacher, not at the lower hourly rate provided for in the collective-negotiations agreement.

Appellate Division; Bassett v. Oakland Bd. of Education, A-3577-86T7; opinion by Pressler, P.J.A.D.; decided February 24, 1988; approved March 4, 1988; in Opinions Approved column March 17, 1988.

121 N.J.L.J. Index Page 925.

It must be assumed that, by its silence in N.J.S.A. 18A:11-1 with respect to the number of votes necessary for a local board of education to adopt rules and govern the district, the Legislature intended the common-law rule to apply: a majority vote of the members of the board constituting a quorum is sufficient and the local board's by-law requiring a two-thirds vote of the full board for policy decisions did not bar the nine-member board's adoption of a resolution to close and sell a school by a five to four vote; however, in the absence of any statute to the contrary, the by-law requiring two public meetings for adopting such a policy decision is binding, and the resolution that purported to adopt it at a single meeting must be set aside.

Appellate Division; Matawan Regional Teachers Ass'n et al v. Matawan-Aberdeen Regional School District Bd. of Education, A-1654-86T8; opinion by Brody, J.A.D.; decided March 14, 1988; approved March 28, 1988; in Opinions Approved column April 7, 1988.

121 N.J.L.J. Index Page 1112.

ELECTIONS

Under N.J.S.A. 19:6-18, a statutory committee must meet, nominate in writing and (in the absence of a tie vote) certify to the state party chairman and to the Governor its nominee to a county elections board on or before February 15; since the Hudson County Democratic statutory committee failed to act on time here, the Governor properly commissioned his nominee, a Democrat and a resident of Hudson County.

Appellate Division; In re Hudson Cty. Bd. of Elections, A-3490-86T5; opinion by Muir, J.A.D.; decided October 21, 1987; approved November 2, 1987.

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EMOTIONAL DISTRESS

The issue as framed in *Portee* is inapposite here, where it is not necessary to decide whether *Portee's* abandonment of the physical-injury requirement should extend to all "direct" claims for emotional distress; one need look no further than the exceptions for the "negligent handling of a corpse" or the "special likelihood that a claim is genuine" to conclude that, to recover in tort, plaintiffs need not demonstrate any physical manifestation of their emotional distress at the hospital's maintaining their son on a respirator, against their wishes, for three days after he was declared brain dead.

Supreme Court; Strachan v. John F. Kennedy Memorial Hospital et al, A-77 Sept. Term 1986; opinion by Clifford, J.; partial dissent by O'Hern, J.; decided March 16, 1988.

121 N.J.L.J. Index Page 669.

A cause of action for emotional distress by surviving family members cannot be equated with a per quod claim because it is a separate action, not a derivative claim, and defendant must pay the policy limit of $50,000 per accident here, not the $25,000 per injury; furthermore, the term "bodily injury" in the policy is construed to encompass a claim for emotional distress.

Appellate Division; Wolfe et al v. State Farm Insurance Co., A-5530-86T7; opinion by Ashbey, J.A.D.; decided April 11, 1988; approved April 19, 1988; in Opinions Approved column May 19, 1988.

121 N.J.L.J. Index Page 1455.

EMPLOYMENT

The trial court erred in not granting judgment for defendant at the close of plaintiff's case since *Woolley* does not apply here, where the fired management employee had an individual written contract that expressly stated that his employment was at will.

Appellate Division; Ware v. Prudential Ins. Co., A-3033-85T7; opinion by Skillman, J.A.D.; decided September 21, 1987; approved October 13, 1987.

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A retaliatory discharge of an at-will employee for pressing an employment-discrimination claim would violate New Jersey's public policy; plaintiff's complaint and supporting papers, read most indulgently (as they must be on defendant's motion for summary judgment), suggest a cause of action for gender discrimination in employment or, alternatively, for being discharged for seeking to establish (by demanding to see her personnel file) a gender-discrimination claim, and the summary judgment is reversed.

Supreme Court; Velantzas v. Colgate-Palmolive Company, Inc., A-59 Sept. Term 1987; per curiam opinion; decided January 27, 1988.

121 N.J.L.J. Index Page 420.

Legality of religious use of peyote relevant to constitutionality of denial of unemployment benefits based on drug use.

Employment Division v. Smith, 86-946, 86-947, U.S. Supreme Court on Writ of Certiorari to the Supreme Court of Oregon.

121 N.J.L.J. Index Page 1225.

State agency's decision to waive its 60-day limitation period, pursuant to a work-sharing agreement with the EEOC, terminates agency's proceedings.

Equal Employment Opportunity Commission v. Commercial Office Products Company, 86-1696, U.S. Supreme Court on Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit, May 16, 1988.

121 N.J.L.J. Index Page 1227

Delivery of unstamped letters to employees from potential union violates Private Express Statutes.

Regents of the University of California v. Public Employment Relations Board, 86-935, U.S. Supreme Court on appeal from the California Court of Appeal, 1st Appellate District, April 20, 1988.

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An employee may maintain an action for wrongful retaliation for personnel actions that are short of discharge and have an effect on either compensation or job rank.

Zamboni v. Stauffer, et al; No. 87-5397; on appeal from the United States District Court for the district of New Jersey; opinion by Sloviter, U.S.C.J.; filed May 17, 1988.

121 N.J.L.J. Index Page 1357.

EMPLOYMENT AGENCIES

Fees are not collectable by unlicensed persons or entities for licensed activities, and the collection of a permanent-placement fee by one not licensed by this State to conduct an employment agency would be contrary to public policy.

Appellate Division; Accountemps Division of Robert Half of Philadelphia, Inc. v. Birch Tree Group, Ltd., A-3553-86T7; opinion by Stein, J.S.C. (t/a); decided March 31, 1988; approved April 19, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1401.

ENGAGEMENT RINGS

Plaintiff's gift of an engagement ring to defendant was conditioned on marriage; when the engagement was broken, regardless of fault, the condition was not fulfilled and she must return the ring to him.

Chancery Division; Aronow v. Silver, C-6821-86; opinion by Haines, A.J.S.C.; decided November 17, 1987; approved February 9, 1988.

121 N.J.L.J. Index Page 738.

ENVIRONMENTAL PROTECTION
(See also **Counties, Insurance**)

If a company's operations may threaten the environment, its auxiliary operations may pose a similar threat and should be subject to the same regulation; even though this wholly owned research center devotes most of its efforts to products not now produced by its parent corporation, it has an auxiliary relationship with the parent corporation and therefore should be classified under ECRA on the basis of the parent corporation's activity.
Appellate Division; In re Robert L. Mitchell Technical Center, A-5451-86T7; opinion by Bilder, J.A.D.; decided March 1, 1988; approved March 11, 1988.

121 N.J.L.J. Index Page 986.

ENVIRONMENTAL PROTECTION — MUNICIPAL LAND USE

The sewage sludge that will be treated at the county utilities authority's proposed facility is "solid waste," and the Solid Waste Management Act preempts it from local regulation; however, N.J.S.A. 40:55D-31 requires that the plans be submitted to the local planning board so that it can evaluate the impact on municipal concerns and make recommendations (which the authority may accept or reject).
Law Division; The Ocean County Utilities Authority v. Berkeley Tp. Planning Bd. L-047803-87 PW; opinion by Clyne, J.S.C.; decided July 16, 1987; approved November 4, 1987.

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The Law Division judgment exempting the county utilities authority from municipal site plan or variance approval for its proposed sludge facility is affirmed, as is the requirement that the authority submit the plans to the planning board to assimilate into its master plan and to make recommendations that the authority may accept or reject; its recommendations respecting minimizing adverse impact from truck traffic, screening to protect property values, and limiting the height of silos and smokestacks should be complied with or accommodated if not unreasonable or in conflict with the Solid Waste Management Act.
Appellate Division; The Ocean County Utilities Authority v. Berkeley Twp. Planning Bd., A-5010-86T7; opinion by Furman, P.J.A.D.; decided March 10, 1988; approved March 23, 1988; in Opinions Approved column March 31, 1988.

121 N.J.L.J. Index Page 1111.

ENVIRONMENTAL PROTECTION — PREEMPTION — TAXES

Severability during the limited period of partial pre-emption by the federal "Superfund" act is manifestly consistent with the legislative intent here, given the overall structure and purpose of the N.J. Spill Compensation and Control Act; the U.S. Supreme Court's partial-pre-emption decision in this case should not be restricted to prospective application, and the remedy will implement the intent of Congress in repealing the pre-emption: if the Legislature does not reimburse the Spill Fund for the full amount of pre-empted expenditures within six months, the Fund shall refund to plaintiffs, pro rata, so much of the pre-empted expenditures as bears the same proportion to the total as the Spill Act taxes paid by plaintiffs bears to the total amount of Spill Act taxes collected.
Supreme Court; Exxon Corp. et al v. Hunt et al, etc., A-158 Sept. Term 1986; opinion by Stein, J.; decided December 2, 1987.

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ENVIRONMENTAL PROTECTION — SPILL ACT

Where a lessee was observed burying leaking steel drums containing chemicals on the unleased portion of the landlords' property without the landlord's participation, and an action was subsequently brought by DEP against the landlord, the Spill Act applied, not the Water Pollution Control Act, which is limited to those who discharge a pollutant; the Spill Act imposes strict liability against any person "in any way" responsible for any hazardous substance.
Appellate Division; DEP v. Arky's Auto Sales et al, A-3684-86T1; opinion by Furman, P.J.A.D.; decided April 7, 1988; approved April 20, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1404.

EQUAL ACCESS TO JUSTICE ACT

Social Security.
Taylor (appellant) v. Heckler, Third Circuit Court of Appeals, No. 87-1039, filed Dec. 23, 1987.
On appeal from the United States District Court for the Eastern District of Pennsylvania.
Opinion by Higginbotham, Circuit Judge.

121 N.J.L.J. Index Page 461.

ERISA

The nonforfeiture and antialienation provisions of ERISA, as well as the legislative history, prohibit an employer from asserting employee misconduct as a defense to payment of a pension plan.

Crausman v. Curtis-Wright Corp.; Civil No. 87-3578; opinion by Wolin, U.S.D.J.; filed February 1, 1988.

121 N.J.L.J. Index Page 813.

Bonding requirement of **ERISA 412(a), 29 U.S.C. 1112(1982).**
Musso et al. Trustees of Teamsters Local 641 Pension Fund, appellees, v. Baker, Secretary of the Department of the Treasury, et al., appellants, No. 87-5323. Appeal from the U.S. District Court for the District of New Jersey to the U.S. Court of Appeals for the Third Circuit, Slip Opinion Dec. 2, 1987. Before Seitz, Hutchinson and Aldisert, Circuit Judges. Opinion delivered by Seitz, Circuit Judge.

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ERISA — PREEMPTION

N.J.S.A. 2A:170-90.2, which makes the failure of an employer to make contributions to an employee pension plan a disorderly persons offense, is preempted by the Federal Employee Retirement Security Act and the municipal court's dismissal of these complaints is affirmed; this undercuts dictum (about restitution as an incident of the disposition of a disorderly persons conviction) in *Pivezl*, which did not pass on the preemption question.
Appellate Division; State v. Burton et al, A-5716-85T5; per curiam (Judges Greenberg, Coleman, and Cohen) opinion; decided January 20, 1987; approved May 7, 1987; in Opinions Approved column February 25, 1988.

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ERISA — VACATION PAY

It is probably incorrect to assume that issues of vacation pay should become issues of federal law; however, since the parties have argued this case on the basis that the issue of an employer's determination of an employee's entitlement to accrued vacation pay on layoff is preempted by the Employee Retirement Income Security Act of 1974, the *Bruch v. Firestone* "contractual construction" standard of judicial review for unfunded plans not involving neutral administrators, which is similar to the standard under state law, will be applied here (not the highly deferential "arbitrary and capricious" standard for determinations of eligibility under ERISA).
Supreme Court; Erich et al v. GAF Corporation et al, A-70 Sept. Term 1987; opinion by O'Hern, J.; decided May 10, 1988; in Opinions Approved column May 19, 1988.

121 N.J.L.J. Index Page 1216.

ESTATES

Estate executor must provide known creditor with ascertainable notice of probate proceedings.

Tulsa Professional Collection Services, Inc. v. Pope, 86-1961, U.S. Supreme Court on appeal from the Supreme Court of the State of Oklahoma, April 19, 1988.

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ESTOPPEL — INSURANCE

The carrier providing compensatory coverage for individual members of a police department is estopped from denying coverage for punitive damages here, where it failed to obtain an express reservation of rights from the defendant officer, maintained control of both the compensatory and punitive damage claims, and failed to consider an offer within the policy limits (even though the offer might have been unreasonable if considered as to compensatory claims only); however, the estoppel does not make it responsible to pay an excessive amount agreed to by the officer's independent counsel (after a remittitur was rejected) that would never have been considered by the parties if the carrier were not the responsible entity, and the matter must be set down for trial as to punitive damages.
Law Division; Batista v. Western World Ins. Co. Inc. et al, L-096339-85; opinion by Simon, J.S.C.; decided February 3, 1988; approved April 4, 1988; in Opinions Approved column April 14, 1988.

121 N.J.L.J. Index Page 1223.

ETHICS — LEGAL SERVICES
(See also **Attorneys**)

Since non-commercial, internally-staffed, prepaid legal service plans such as the one dealt with in this opinion (which is funded by employers pursuant to a collective-bargaining agreement with a labor union) provide needed services, the Civil Practice Committee is called on to recommend a rule revision to expressly authorize such organizations to engage in the practice of law.

The rule currently restricting the content of lawyer and law-firm names should be modified to permit a non-commercial organization engaged in providing prepaid legal services to use its own name as part of its official designation or professional letterhead in connection with its practice of law, subject to certain additional conditions relating to full disclosure.

Supreme Court; In re 1115 Legal Service Care, A-104 Sept. Term 1987; opinion by Handler, J.; decided May 24, 1988; in Opinions Approved column June 2, 1988.

121 N.J.L.J. Index Page 1216.

EVIDENCE

The trial judges's decision to have the five-year-old witness testify on closed-circuit television in chambers in the presence of his foster mother, the judge and the attorneys, based on the psychologists' opinion that he should not have to confront his parents when giving evidence about the beating death of his little brother, was clearly warranted; to the extent that *U.S. v. Benfield* and *Herbert v. California* are inconsistent, they are disapproved of in this jurisdiction.

Appellate Division; State v. Bass, A-836-83T4; opinion by O'Brien, J.A.D.; decided September 22, 1987; approved October 9, 1987.

121 N.J.L.J. Index Page 17.

Defendant, which did not supply an expert's report from plaintiff's treating physician, may nevertheless call him as a trial witness to testify that plaintiff has no permanent disability and that he had so informed plaintiff.
Law Division; Kurdek v. West Orange Bd. of Education, L-059809-85; opinion by Villanueva, J.S.C.; decided December 10, 1987; approved January 25, 1988.

121 N.J.L.J. Index Page 522.

Here, where a police officer was being tried for official misconduct and criminal coercion on the grounds that he illegally strip-searched two women, evidence of prior similar incidents involving the officer's use of his position to engage in sexual activity through threats of arrest was properly admitted under Evid. R. 55 to show his intent and state of mind, and that he acted in accordance with a common plan; evidence of another crime is proper where it is demonstrated to be relevant to the issue of a defendant's guilt of the crime charged.
Appellate Division; State v. Stevens, A-281-84T4; opinion by Scalera, J.A.D.; dissent by Brody, J.A.D.; decided February 19, 1988; approved March 4, 1988; in Opinions Approved column March 17, 1988.

121 N.J.L.J. Index Page 987.

Although evidence that an individual repeatedly drove carelessly on a particular part of a particular road is admissible under Evid. R. 49, general evidence of careless driving is inadmissible to show how someone drove on a particular occasion, and defendant's driving record should not have been admitted as evidence of habit or custom in his trial for aggravated manslaughter; however, the error was harmless here, where the State had questioned defendant as to his driving record without objection.
Appellate Division; State v. Bogus, A-3626-85T5; opinion by Michels, P.J.A.D.; decided March 4, 1988; approved March 18, 1988; in Opinions Approved column March 31, 1988.

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Similar act need not be proved before admission on proof of knowledge.

Huddleston v. United States, 87-6, U.S. Supreme Court on Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit, May 2, 1988.

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EVIDENCE — VIDEOTAPES

Although using the certification in lieu of oath in this case was admittedly a convenient way to avoid redoing the entire videotaped deposition, the witness (who was unavailable to testify in court because of agoraphobia) was nevertheless under the same solemn obligation to tell the truth and was subject to the same sanctions as if she had been sworn in prior to testifying.
Appellate Division; State v. Freeman, A-5853-84T4; opinion by Michels, P.J.A.D.; decided February 17, 1988; approved March 8, 1988; in Opinions Approved column March 17, 1988.

121 N.J.L.J. Index Page 982.

EVIDENCE — INFANTS — SEXUAL OFFENSES

The adoption of a further modification to Evid. R. 63 is necessary and appropriate to authorize under certain circumstances the admissibility, in a criminal prosecution, of a child victim's out-of-court statement concerning acts of sexual abuse; however, so significant a modification of the hearsay rule must be adopted in accordance with the procedures in the Evidence Act involving all three branches of government, so admitting the victim's out-of-court statement in this case constituted reversible error.

The Supreme Court's standing Committee on the Rules of Evidence is invited to review the amendment hereby proposed for the concurrence of the Legislature and the Governor [see appendix] and to also consider the need for modifying the competency requirements for child victims in sexual-abuse prosecutions where no out-of-court statement of the child is to be offered in evidence, as well as the criteria for determining the reliability of a child victim's out-of-court statement.
Supreme Court; State v. D.R., A-12/13 Sept. Term 1987; opinion by Stein, J.; decided February 9, 1988.

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EVIDENCE — PRISONS

The residuum rule (that an administrative adjudication may not be based *solely* on hearsay) has never been applied to prison disciplinary hearings, and their unique problems concerning institutional and personal security may compel its exclusion; in any event, the evidence against the inmate found guilty of bribing a staff member while participating in a drug-trafficking operation within the prison was, although hearsay, admissible as a declaration against interest.
Appellate Division; Negron v. Dept. of Corrections et al, A-558-86T6; opinion by Deighan, J.A.D.; decided July 29, 1987; approved October 27, 1987.

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EVIDENCE — RELIGION

Plaintiff claims that granting a "get," which he now believes is unnecessary, would be contrary to his current religious beliefs, but his offer to defendant's attorney to grant one for $25,000 takes the issue outside of the First Amendment; that offer, otherwise excludable under Evid. R. 52, is admissible as showing that plaintiff's refusal is not religious but is an issue of monetary gain.

Chancery Division, Family Part; Burns v. Burns, FM-04-06884-81; opinion by Natal, P.J.F.P.; decided December 4, 1987; approved February 24, 1988.

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EVIDENCE — SEXUAL ASSAULT

To qualify as a complaint under the "fresh complaint" rule, the victim's statements must at least be self-motivated and not extracted by interrogation, and the trial court should not have permitted the mother of the 11-year-old victim, and the mother of the friend to whom the victim had related the incident of sexual abuse, to testify about her answers to their questions; further, their testimony was excessively detailed and went beyond what the victim herself testified to.

Although the trial court's instruction tracked the model jury charge, it invites the jury's misapplication of fresh-complaint testimony and, in saying that such testimony is admitted to "bolster" the victim's credibility, the trial court erred (to the extent that *State v. Ramos* so holds, it is overruled); principles governing fresh-complaint testimony, where (as here) it is offered to rebut any assumption that the victim had *not* reported an incident of sexual abuse, are set forth for guidance on the remand.
Appellate Division; State v. J.S., A-5832-84T4; opinion by Antell, P.J.A.D.; decided January 15, 1988; approved February 1, 1988.

121 N.J.L.J. Index Page 684.

EVIDENCE — UNEMPLOYMENT INSURANCE

The standard employer forms filed in the name of defendant corporation, signed by the individual defendant and bearing the official stamp of the Department of Labor were admissible here, where a proper foundation had been laid by Dept. of Labor personnel; defendants' claim that there was insufficient evidence that they had failed to remit unemployment-insurance contributions with the fraudulent intent that is an essential element of charges under N.J.S.A. 43:21-16(e) is rejected and their convictions are affirmed.
Appellate Division; State v. Emers, A-3671-85-T4; per curiam (Judges Pressler and Ashbey) opinion; decided May 29, 1987; approved November 4, 1987.

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EXPERT WITNESSES

The "evidential support, experiential or the like" referred to in *Buckelew* is not limited to treatises or any type of documentary support but can be based on what the expert witness has learned from personal experience or from persons with adequate training and experience; a doctor who entered medical school after the asserted medical malpractice in this case (prescribing a drug to plaintiff's mother that allegedly caused his numerous birth defects) may still be able to express an opinion about acceptable medical standards at that time, and the trial court should not have barred his testimony.

Appellate Division; Bollardini v. Krikorian, A-4272-86T8; per curiam (Judges Petrella and Ashbey) opinion; decided January 7, 1988; approved February 18, 1988.

FAIR TRIAL

The federal rule is that, where a defendant is represented by counsel, a waiver of the right not to be compelled to appear at trial in prison garb is implied from the defendant's failure to object and, since there was no compulsion here, defendant's conviction for murder should not have been vacated; however, in future, criminal defendants who appear for a jury trial in prison garb should be personally questioned by the trial judge concerning their desire to relinquish the right to appear in civilian clothes, and that right should be given up only by a knowing, intelligent and voluntary waiver on the record; moreover, a defense request for civilian clothing (or for a precautionary voir dire or jury charge) may not be denied.

Appellate Division; State v. Carrion-Collazo, A-3434-86T5; opinion by Shebell, J.A.D.; decided October 29, 1987; approved November 25, 1987.

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Although the judge's ruling, when the prosecution objected during summation, that defense counsel's statement that no scientific evidence had been presented by the State was "not a proper comment" and that "if either party wanted to bring scientific evidence into this case they should have done so" was erroneous, it was effectively overcome by later summations and specific instructions, and was not sufficiently prejudicial to mandate a reversal of defendants' convictions for aggravated sexual assault, etc.

Supreme Court; State v. Grice etc., A-7/8 Sept. Term 1987; per curiam opinion; decided February 29, 1988.

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FAMILY LAW

Although res judicata does not apply here because the paternity issue was not actually litigated in the divorce proceeding, where agreement as to child custody and support is incorporated in the judgment the estoppel-controversy doctrine bars the wife's subsequent Parentage Act claim that another man, not the husband, was her son's father.

Appellate Division; B.P. v. G.P. et al, A-949-86T5; per curiam (Judges Deighan and Muir) opinion; decided April 15, 1987; approved February 1, 1988.

121 N.J.L.J. Index Page 571.

The appellate court, while reversing (as not justified by the trial judge's factual findings) the order issued under the Prevention of Domestic Violence Act permanently restraining defendant from returning to the apartment plaintiff shared with him, is reluctant to reverse the prior temporary ex parte order because the immediate response of an emergency judge is entitled to appellate respect in such high-risk situations — however, it is emphasized here that an ex parte emergency restraining order under the act depends on a finding that the plaintiff is in danger of domestic violence; the act was never intended to provide a jurisdictional basis for property disputes unsupported by the jurisdictionally required fact finding and unrelated to its purpose.

Appellate Division; Grant v. Wright, A-5950-85-T8; opinion by Ashbey, J.A.D.; decided January 22, 1988; approved February 3, 1988.

121 N.J.L.J. Index Page 597.

FAMILY LAW — WELFARE

Primary responsibility for the support of illegitimate children belongs to the parents, not the public welfare system, and defendant's two illegitimate children are entitled to the same right to support from him as his five children born in wedlock; on remand, the full financial picture of these parties should be developed as a basis for a support order, following the dictates of N.J.S.A. 9:17-53(e) and, if using the Appendix IX child-support guidelines, which do not account for the economic impact of more than six children, adjusting for the fact that defendant is the father of seven children in all.

Appellate Division; Essex County Division of Welfare v. Walker, A-5009-86T8; opinion by Long, J.A.D.; decided March 10, 1988; approved March 23, 1988; in Opinions Approved column March 31, 1988.

121 N.J.L.J. Index Page 1118.

FAMILY PART

This tort action brought by the former wife against the former husband for allegedly having infected her with herpes during the marriage will not be transferred to the Family Part or consolidated with an ongoing custody dispute; this tort is independent of the underlying Family Part cause of action as in *Brown*, and it is distinguished from *Tevis* in that it was not discovered until 22 months after the divorce.

Law Division; J.Z.M. v. S.M.M., L-61535-87; opinion by Segal, J.S.C.; decided January 1, 1988; approved April 18, 1988; in Opinions Approved column April 28, 1988.

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FICTITIOUS DEFENDANTS (See **Civil Procedure**)

FINGERPRINTS

A conviction may be based solely on fingerprint evidence as long as the attendant circumstances establish that the object on which the prints are found was generally inaccessible to the defendant and, thus, a jury could rationally find beyond a reasonable doubt that the object was touched during the commission of the crime; the prosecution need not exclude every possibility that the fingerprints had been imprinted at some other time.

Appellate Division; State v. Watson, A-4443-86T4; opinion by Baime, J.A.D.; decided April 13, 1988; approved April 20, 1988; in Opinions Approved column May 19, 1988.

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FIREFIGHTERS — PUBLIC EMPLOYMENT

PERC's denial of the Firemen's Mutual Benevolent Association's application to represent 25 firefighters who are now represented by a mixed negotiating unit is reversed and remanded; in light of the strong public policy supporting the compulsory arbitration that is only available to firefighters who are members of a negotiating unit exclusively composed of firefighters, an application for severance must be granted absent a showing by the party adverse to it that it would have a negative impact on labor stability.

Appellate Division; In re N.J. State Firemen's Mutual Benevolent Ass'n, A-3491-85T6; per curiam (Judges Furman, Brody and Long) opinion; decided January 27, 1988; approved February 18, 1988.

121 N.J.L.J. Index Page 692.

FIREMAN'S RULE

A landowner has no obligation to have inspected and prepared the premises for a firefighter who responds to an emergency call, and defendant is relieved of liability for injuries caused by icy steps (irrespective of whether there was underlying negligence) under the "fireman's rule"; the firefighter assumed the risk of icy conditions, one of the inherent risks of his calling.

Law Division, Special Civil Part; Maryland Casualty Co. v. Heist, 577996; opinion by Eichen, J.S.C.; decided February 4, 1988; approved April 5, 1988; in Opinions Approved column April 14, 1988.

121 N.J.L.J. Index Page 1166.

FOOD AND DRUG ADMINISTRATION — GENERIC DRUGS

Tri-Bio Laboratories Inc. (appellant) v. United States of America and Food and Drug Administration, Third Circuit Court of Appeals, No. 87-5123, filed Dec. 29, 1987.
On appeal from the United States District Court for the Middle District of Pennsylvania.
Opinion by Weis, Circuit Judge.

121 N.J.L.J. Index Page 509.

FORUM NON CONVENIENS — MATRIMONIAL LAW

Although the court continues to have jurisdiction over the parties, who now both reside in North Carolina, for proceedings enforcing the New Jersey divorce judgment, it invokes sua sponte the equitable doctrine of forum non conveniens and will not invoke its jurisdiction at this time.

Chancery Division, Family Part; List v. List; M-27484-79; opinion by Krafte, J.S.C.; decided January 19, 1988; approved April 5, 1988; in Opinions Approved column April 14, 1988.

121 N.J.L.J. Index Page 1223.

FREE SPEECH — MUNICIPAL LAND USE — TRESPASS

The borough's restrictive sign ordinance may not be enforced against plaintiff's "no trespassing" signs on his property because that would interfere with the operation of the trespass statute (which requires notice) and would violate constitutional guarantees of freedom of speech.

Law Division; Dolecky v. Riverton, L-018684-87; opinion by Haines, A.J.S.C.; decided June 1, 1987; approved February 9, 1988.

121 N.J.L.J. Index Page 616.

FREE SPEECH — MUNICIPAL LAND USE

The municipal-wide ban on all "billboards, signboards, and off-premises advertising signs and devices" is facially unconstitutional; because noncommercial speech is implicated, the burden of overcoming the charge of constitutional invalidity is particularly strenuous, and the township has not demonstrated that its ordinance furthers a particular, substantial government interest and is sufficiently narrow to further only that interest without unnecessarily restricting freedom of expression.

Supreme Court; Bell v. Stafford Twp. et al, A-68 Sept. 1987; opinion by Handler, J.; decided May 26, 1988.

121 N.J.L.J. Index Page 1397.

FREE SPEECH — TAMPERING

As interpreted here, N.J.S.A. 2C:28-5a(2) is not overbroad or void for vagueness, and the required elements of knowledge and purpose to coerce or induce witnesses or informants not to cooperate with law enforcement could be inferred from the content of defendant's statements to his subordinates and the context in which they were spoken; when the public interest in disclosing the truth in official proceedings is balanced against a party's right to speak to a witness with the intent of tampering, that party's free-speech right is minuscule.

Appellate Division; State v. Crescenzi, A-1259-86T4; opinion by Landau, J.A.D.; decided March 30, 1988; approved April 19, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1400.

FREEZE ACT — JURISDICTION — TAXES

N.J.S.A. 54:3-21 does not support the view that challenging an assessment of over $750,000 in the Tax Court automatically preempts the jurisdiction of a county tax board; appellant taxpayer was entitled to use either forum and the Tax Court judge erred in ruling out Freeze Act application to the county tax board judgment in this case, where appellant withdrew its timely Tax Court complaint after it had filed a petition with the county tax board challenging the same $2,700,000 assessment.

Appellate Division; Union City Associates v. Union City, A-2412-86T7; opinion by Long, J.A.D.; decided March 7, 1988; approved March 18, 1988; in Opinions Approved column March 31, 1988.

121 N.J.L.J. Index Page 1117.

FUNDS IN COURT — INSURANCE

The Law Division decision authorizing the injured plaintiff to withdraw the money that the now-insolvent insurer had deposited with the court, pursuant to R. 4:57-1, is affirmed; the deposit was made without any expectation that the funds would be returned, and the Uniform Insurers Liquidation Act includes as assets vested in a receiver of an insolvent insurer property not deposited "for the ... benefit of specified persons."

Appellate Division; Kostick v. Janke et al, A-527-87T7; per curiam (Judges Petrella, Dreier and Baime) opinion; decided March 4, 1988; approved March 18, 1988; in Opinions Approved column April 7, 1988.

121 N.J.L.J. Index Page 1117.

The insurer that subsequently became insolvent and was liquidated in Missouri under the Uniform Insurance Liquidation Act had relinquished control over these funds when it placed them with the Superior Court pursuant to R. 4:57-1 after the injured plaintiff filed suit, which has been settled; funds deposited in court do not remain an asset of the insolvent estate, and plaintiff's motion to withdraw the money is granted.

Law Division; Kostick v. Janke et al, L-68478-81; opinion by Ciolino, A.J.S.C.; decided August 11, 1987; approved November 4, 1987.

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GRAND JURIES
(See also **Attorney-Client Privilege**)

N.J.S.A. 2A:78-5 prohibits the per se exclusion of residents or taxpayers from actions involving the interests of their municipalities, and a challenger has the burden of showing partiality or bias; there is no evidence of bias or partiality among the members of the special grand jury that delivered a presentment charging three former Paterson officials with mismanaging CETA funds, and the assignment judge's independent review of the evidence has provided a final safeguard of petitioners' rights, so their motion to quash the presentment because some of the grand jurors lived in Paterson is denied.

Law Division; In re Presentment of Passaic County Grand Jury, 81038; opinion by Mandak, A.J.S.C.; decided October 20, 1986; approved July 24, 1987; in Opinions Approved column February 18, 1988.

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Although the two deputy attorneys general demonstrated extraordinarily poor judgment by not advising the assignment judge that two of the grand jurors had connections with insurance companies that had allegedly been victimized by defendant and resolving on their own whether those jurors could serve without bias or prejudice, they were not deliberately violating an established precedent and defendant's conviction will not be reversed; however, any future deviation from the procedures outlined in this opinion will lead to the dismissal of any resulting indictment.

As an officer of the court, the prosecuting attorney has a responsibility to bring to the attention of the presiding judge any evidence of partiality or bias that could affect the impartial deliberations of a grand juror; upon such a disclosure, the court should determine whether such partiality or bias exists and whether it justifies excusing the grand juror from the particular case being considered or from the panel.

Where a State grand jury is investigating corruption in a particular industry, it may be appropriate to fashion a brief inquiry into the backgrounds of potential grand jurors that will enable the court to determine readily their potential for bias or interest; the specifics of such procedures are left to the Criminal Practice Committee's exploration of grand-juror qualifications and any other consequences of this ruling.

Supreme Court; State v. Murphy, A-27 Sept. Term 1987; opinion by O'Hern, J.; decided March 28, 1988; in Opinions Approved column March 14, 1988.

121 N.J.L.J. Index Page 913.

GUARANTIES

The trial court erroneously concluded that the old indebtedness was destroyed here when the bank marked the old note paid and returned it to the debtor corporation upon executing a new note for the unpaid balance; whether the giving of a note pays off the old depends on the intentions of the parties and, in the absence of a specific revocation notice to the lender in this case, the liability of the signers on the original note of unconditional and continuing guarantees of the obligations of the corporation continued, even after they had sold their ownership interest in it (for a small amount of cash, with the balance secured by liens).

Appellate Division; Mount Holly State Bank v. Mount Holly Washington Hotel, Inc. et al, A-112-86T1; opinion by Bilder, J.A.D.; decided October 14, 1987; approved October 28, 1987.

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There is a difference between a creditor's good-faith choice after a default to look solely to any one or more of the guarantors and a concealed pre-transaction agreement with a co-guarantor not to pursue him; here, where defendant contends that he would not have entered the agreement without assurances of another primary personal guaranty, the trial court must determine whether it was fraudulent for the bank to lead him to believe that he was one of three who would be initially responsible when, even before the transaction was consummated, the bank intended to look only to him (and his less affluent partner), leaving him to his remedies against the third guarantor.

Appellate Division; The Ramapo Bank v. Bechtel et al, etc., A-3801-86T8; opinion by Dreier, J.A.D.; decided April 7, 1988; approved April 20, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1403.

HABEAS CORPUS

Ineffective Assistance of Counsel.
O'Halloran (appellant) v. Ryan, et al. No. 87-1015, Decided Dec. 18, 1987. On appeal to the United States Court of Appeals for the Third Circuit from the United States District Court for the Eastern District of Pennsylvania. Opinion by Weis, Circuit Judge.

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HABEAS CORPUS — BAIL.
United States v. Smith (appellant), Third Circuit Court of Appeals, No. 87-5756, filed Dec. 29, 1987.
On appeal from the United States District Court for the Middle District of Pennsylvania.
Opinion by Sloviter, Circuit Judge.

121 N.J.L.J. index Page 508.

HEALTH BENEFITS ACT

The State Health Benefits Commission is without statutory authority to exclude from coverage dependents of state employees who are totally disabled because of mental illness while including dependents disabled because of mental retardation or physical handicap.

Appellate Division; G.B. et al v. State Health Benefits Comm'n, A-1462- 86T7; opinion by Shebell, J.A.D.; decided January 6, 1988; approved January 22, 1988.

121 N.J.L.J. Index Page 571.

IDENTIFICATION

The inability of this eyewitness to identify defendant in all but one of the 13 photographs (taken at defendant's birthday party) shown to him by the police two months after the armed robbery suggests that his identification was the product of this impermissibly suggestive procedure; although a trial court is required to reach the issue of "taint" only if it first finds that the identification process was unduly suggestive (as the courts below, incorrectly, did not), where the procedures are as questionable as those in this case, the better practice would be to hold a taint hearing and make specific

findings of fact on the independent reliability of the identification.
Supreme Court; State v. Madison, A-55 Sept. Term 1987; opinion by **Garibaldi**, J.; decided February 2, 1988.

121 N.J.L.J. Index Page 513.

IMMIGRATION

Natural tendency to influence decision test deemed proper test to determine materiality of concealments or misrepresentations.
Kungys v. United States, 86-228, U.S. Supreme Court on Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit, May 2, 1988.

121 N.J.L.J. Index Page 1226.

INCOMPETENTS

A person confined to a mental institution may maintain an action challenging her commitment and confinement provided her interests and the interests of her guardian are in conflict.
Bonnie S. et al v. Altman et al; Civ. No. 87-3709; opinion by Sarokin, U.S.D.J.; filed April 19, 1988.

121 N.J.L.J. Index Page 1359.

INDEMNIFICATION
(See also **Contractors**)

The *Delaughty* test for determining whether an indemnification agreement contemplates that the indemnitee be indemnified for its own negligence (establishing a "work-relatedness" concept) has been modified by *Ramos*, which requires language unequivocally including the indemnitee's negligence; the clause in question here falls short of exculpating the lessor of the railroad cars for its own negligence and, therefore, also for a latent defect caused by a faulty design, and the matter is remanded for trial.
Appellate Division; Gulf Oil Corp. v. ACF Industries, Inc., A-4501-86T8; opinion by Dreier, J.A.D.; decided December 4, 1987; approved December 23, 1987.

121 N.J.L.J. Index Page 471.

Although a strict reading of N.J.S.A. 2A:40A-1 as it was when the landlord and tenant entered into this lease would render unenforceable the tenant's agreement to indemnify the landlord for any injury to a third party resulting from negligence by the tenant (who was responsible for maintenance of the building), a subsequent amendment to the statute only prohibiting indemnifications for the promisee's *sole* negligence in construction and maintenance contracts is applied retroactively; this agreement, which does not indemnify the landlord for its own negligence, is therefore enforceable against the tenant.
Appellate Division; Ryan v. Biederman Industries et al, A-3587-86T7; per curiam (Judges Petrella and Baime) opinion; decided March 14, 1988; approved March 28, 1988; in Opinions Approved column April 7, 1988.

121 N.J.L.J. Index Page 1162.

INDICTMENTS

The presumption of validity of this indictment, charging the unlawful disposal of hazardous waste, has been rebutted here, where the trial court correctly found that the necessary voting grand jurors did not have time to adequately inform themselves of all of the voluminous evidence presented; however, on remand, defendants have the burden of showing precisely how the evidence that was not adequately reviewed would undermine the integrity of the grand jury's vote as to each of the 35 counts.
Appellate Division; State v. Cha-Geigy Corp. et al, A-307-87T5; opinion by Scalera, J.A.D.; decided January 20, 1988; approved February 9, 1988.

121 N.J.L.J. Index Page 690.

The assignment judge's dismissal of this indictment is sympathized with, but long-standing case law requires reversal because, although the testimony was largely or exclusively incompetent by virtue of the assistant prosecutor's leading questions, there was evidence before the grand jury sufficient to sustain the charges (including the allegation under N.J.S.A. 2C:39-4a — the fact that the victim was hit with a BB pellet gives rise to at least an inference of an unlawful purpose sufficient to return an indictment); the Supreme Court can, of course, reconsider issues regarding the quantum and quality of grand-jury presentations.
Appellate Division; State v. Holston, A-1011-87T5; opinion by Stern, J.A.D.; decided March 18, 1988; approved April 4, 1988; in Opinions Approved column April 14, 1988.

121 N.J.L.J. Index Page 1222.

INFANCY — LIMITATIONS OF ACTIONS
(See also **Evidence**)

The common-law coming-of-age rule, which provides that one reaches full age on the day prior to the anniversary of one's birth, is rejected in favor of the uniform method of calculation applicable to legal matters in New Jersey: the date of the event from which a designated period begins to run is not included in determining a time limitation; thus plaintiff, who was injured when he was 15, cause of age on his 18th birthday, December 17, 1979, and his complaint, filed December 17, 1981, was within time and should not have been dismissed.
Appellate Division; Patterson v. Monmouth Regional High School Bd. of Education, A-5387-85T7; opinion by Long, J.A.D.; decided November 9, 1987; approved February 3, 1988.

121 N.J.L.J. Index Page 736.

INFORMED CONSENT — MEDICAL MALPRACTICE

The *Kaplan* "professional" standard for informed consent (requiring a physician to disclose those risks of treatment that a reasonable physician in the community, of like training, would customarily make in similar circumstances) is overruled in favor of *Canterbury's* objective "prudent patient" or "materiality of risk" standard; a risk would be deemed "material" when a reasonable patient, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether to forego or submit to the proposed therapy.
Supreme Court; Largey v. Rothman, A-52 Sept. Term 1986; per curiam opinion; decided May 5, 1988; in Opinions Approved column May 26, 1988.

121 N.J.L.J. Index Page 1105.

INSURANCE
(See also **Civil Procedure, Estoppel, Funds in Court** and **Minors**)

Homeowner's Policy Excluded from Covering Auto Accident — "Other Insurance" Clause of Business Auto Policy Does Not Limit Coverage under Personal Auto Policy or Separate Integrated Comprehensive Liability Policy — Applicability of Comprehensive Liability Policy to Auto Accident.
Berger v. USF&G and Fitchburg Mutual, Nos. 86-5863, 86-5864, Appealed from the U.S. District Court of the District of New Jersey to the U.S. Court of Appeals for the Third Circuit, Slip Opinion Nov. 30, 1987.
Before **Higginbotham, Becker**, and **Hunter**, Circuit Judges. Opinion delivered by **Becker**, Circuit Judge.

121 N.J.L.J. Index Page 71.

No statute or policy provision controlled the procedure for surrendering the life-insurance policy here, and there was no new contract for termination, as required by *Meier*; since the parties had not come to an agreement respecting the cash surrender value before the insured's death, the trial court properly determined that the insurer was obligated to pay death benefits, less premium loans and interest.
Appellate Division; Knight v. New England Mutual Life Ins. Co., A-983-86T7; opinion by Coleman, P.J.A.D.; decided October 27, 1987; approved November 12, 1987.

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Here (where coverage was provided before the effective date of N.J.S.A. 17:22-6.42(e) under which a surplus-lines agent may not bind a surplus-lines insurer until the Commissioner has approved their written agreement) there were factual issues as to whether the intermediary in the placement of the policy insuring plaintiff's premises was acting as the agent of the insured or the insurer, and summary judgment for the insurer on the ground that it did not know until after the fire that plaintiff's sprinkler system was inoperative should not have been granted.

An insured does not violate an "increase of hazards" policy clause simply by being negligent; only by a change in the condition or use of the premises will an insured's claim be defeated under such a clause, and the trial court erred in dismissing plaintiff's claim that the insurance broker had breached its duty to procure a policy that would provide fire coverage even though the sprinkler system was not operative.
Appellate Division; Industrial Development Assoc. v. Commercial Union Surplus Lines Ins. Co. et al, A-4888-85T8; opinion by Skillman, J.A.D.; decided January 21, 1988; approved February 3, 1988.

121 N.J.L.J. Index Page 613.

The Commissioner's order limiting the payment by the Surplus Lines Insurance Guaranty Fund of claims against insureds of the insolvent Ambassador Insurance Company to 40% is validly based on provisions in the act that established the fund; although the remedy sought by that enactment is not being fully provided, it is the Legislature, not the court, that can provide the necessary relief.

Appellate Division; Ivy Hill Park Apts. et al v. PLIGA et al, A-4104-85T8; opinion by Shebell, J.A.D.; decided November 17, 1987; approved December 2, 1987.

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Plaintiff, the named beneficiary of his mother's life insurance policy, has a cause of action against his father, who forged plaintiff's signature on the check, the bank that accepted the forged check, and possibly the drawee bank that paid it, but he has no cause of action against the insurance company, which mailed the check for the value of the policy to him at the address he indicated on the claim form.
Law Division; Anderson v. Metropolitan Life Ins. Co. et al, L-53528-86; opinion by Reavey, J.S.C.; decided October 30, 1987; approved March 10, 1988; in Opinions Approved column March 24, 1988.

121 N.J.L.J. Index Page 927.

Plaintiff, who innocently purchased a stolen car and then insured it under an existing policy, could not recover for its loss under the comprehensive coverage when the car was returned to its rightful owner; plaintiff's loss occurred at the time he purchased the car, and he could not reasonably expect to obtain a policy to cover a loss that had already occurred.
Law Division; Cueto v. Allstate Insurance Co. et al, L-048739-86; opinion by Rodriguez, J.S.C.; decided October 20, 1987; approved April 5, 1988; in Opinions Approved column April 14, 1988.

121 N.J.L.J. Index Page 1166.

Where a member of the Teachers Pension and Annuity Fund applied for early retirement to become effective September 1, but the application was not approved until December 10 and notice was not sent until December 28, the conversion period in which he was entitled to have an individual life insurance policy issued after being terminated from group coverage was 31 days from the date he was notified of the approval, thereby entitling his beneficiary to full benefits under the group-coverage plan when he died on January 22.
Appellate Division; McKenna v. The Prudential Insurance Company of America et al, A-346-86T6; opinion by Long, J.A.D.; decided April 4, 1988; approved April 19, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1455.

INSURANCE — ENVIRONMENTAL PROTECTION

A policy providing that the carrier was to pay on behalf of the insured all sums the insured became legally obligated to pay as *damages* "because of bodily injury or property damage" required the carrier to indemnify the insured against a judgment directing it to pay all costs incurred by DEP in implementing the remedies ordered by the trial court to restore to their natural condition the city's watershed land and water supply, which the insured had contaminated; although DEP's request for relief from the insured was framed in terms of a mandatory injunction, the only obligation imposed was the duty to pay money.
Appellate Division; CPS Chemical Company, Inc. et al v. The Continental Insurance Company et al, A-3799-86T5; opinion by Baime, J.A.D.; decided January 15, 1988; approved February 1, 1988.

121 N.J.L.J. Index Page 570.

INSURANCE — UIM COVERAGE

Exhaustion, subrogation and consent-to-settle clauses in underinsured-motorist (UIM) provisions that combine to force the insured either to obtain a judgment against the tortfeasor through litigation as a prerequisite to recourse on the UIM coverage or to accept a settlement offer from the uninsured tortfeasor's carrier in exchange for a general release without the insurer's consent, thereby violating the clause, contravene public policy; in future, an insured who receives an acceptable offer from the tortfeasor's carrier should notify his UIM insurer, which may then promptly offer him that sum in exchange for an assignment of his claim against the tortfeasor (presumptively within 30 days, if notified prior to the assignment of a trial date), and an insured who has not received a response from his carrier and is in doubt whether accepting the tortfeasor's offer will impair his UIM rights may seek an immediate declaratory ruling on order to show cause.
Appellate Division; Longworth v. Van Houten et al, etc., A-975-86T7; opinion by Pressler, P.J.A.D.; decided March 1, 1988; approved March 11, 1988.

121 N.J.L.J. Index Page 977.

INSURANCE BROKERS

Although an insurance broker may not have an obligation in all circumstances to explain the entire gamut of available coverage, defendant may have had an obligation to advise this long-term client that critical coverage was being withdrawn by the insurer but was replaceable at a small additional charge, without waiting to be asked about the insurer's obfuscatory notice about underinsured-motorist coverage, and summary judgment in the broker's favor was improperly granted.

Appellate Division; Wasserman et al v. Wharton, Lyon & Lyon et al, A-4153-86T7; opinion by Pressler, J.A.D.; decided March 2, 1988; approved March 23, 1988; in Opinions Approved column March 31, 1988.

121 N.J.L.J. Index Page 1110.

INTERSTATE COMMERCE COMMISSION

Primary Jurisdiction — Prejudgment Interest on Undercharges.
Consolidated Rail Corporation (cross appellant) v. CertainTeed Corporation (appellant), No. 86-1715 and 86-1732. On appeal to the United States Court of Appeals for the Third Circuit from the United States District Court for the Eastern District of Pennsylvania, Decided Dec. 14, 1987.
Opinion by Weis, Circuit Judge.

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INVASION OF PRIVACY

The absolute privilege to report matters in public records determined by *Cox Broadcasting* is endorsed here.
Supreme Court; Romaine et al v. Kallinger et al, A-17 Sept. Term 1987; opinion by **Handler**, J.; dissent by **O'Hern**, J.; decided February 18, 1988.

121 N.J.L.J. Index Page 562.

JAILS (See **Counties**)

JOINT TORTFEASORS — SETTLEMENTS

Plaintiff's $40,000/$100,000 "high-low" agreement with the driver of the car that hit the car in which he was riding, who was subsequently found 97% liable for the accident, constituted a settlement, and its effect is to bar plaintiff from seeking recovery of the full amount of the $500,000 verdict from his host driver, who was found 3% liable; judgment is entered against the non-settling host driver for $15,000.
Law Division; Shafer v. Crook et al, L-18545-83; opinion by Minuskin, J.S.C.; decided April 24, 1987; approved October 19, 1987.

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JURIES
(See also **Double Jeopardy**)

Although betting on the time and date of the verdict cannot be condoned, nothing in the record suggests that the betting pool had a tendency to influence the jury to reach a verdict it might not otherwise have reached.

Appellate Division; State v. Freeman, A-5853-84T4; opinion by Michels, P.J.A.D.; decided February 17, 1988; approved March 8, 1988; in Opinions Approved column March 17, 1988.

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The interpretation and translation of many telephone conversations in Spanish was a major issue at defendants' trial for conspiring to distribute $12,000,000 worth of cocaine from Columbia, and there was the potential that jurors who could speak Spanish (in varying dialects) would rely on their own interpretations, so *Gilmore* does not apply to the State's use of peremptory challenges to excuse them.

Appellate Division; State v. Pemberthy etc., A-767-84T4; per curiam (Judges Petrella, Dreier and Baime) opinion; decided April 5, 1988; approved April 20, 1988; in Opinions Approved column April 28, 1988.

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JURISDICTION
(See also **Administrative Procedure** and **Freeze Act**)

A physician who does not practice in New Jersey, is not affiliated with any New Jersey institution and does not advertise in the state, is not subject to New Jersey's long-arm jurisdiction in a malpractice action where, as here, he was contacted by the N.J. patient's treating physician, examined the patient at his Philadelphia office and followed up with phone calls to the treating physician in New Jersey; a rule that would permit the filing of a suit in whatever jurisdiction to which the patient carries the consequences of his treatment would make medical professionals hesitant to treat non-resident patients.
Appellate Division; Bovino v. Brumbaugh et al, A-3474-86T5; opinion by Gaynor, J.A.D.; decided December 7, 1987; approved December 23, 1987.

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JUVENILES

N.J.S.A. 2A:4A-44c(2) bars the Family Part from incarcerating in State correctional facilities juvenile offenders who are not subject to waiver (because they are too young or did not commit one of the more serious criminal offenses) *and* are "developmentally disabled"; it does not bar the waiver to adult courts of

"developmentally disabled" juveniles who are eligible for such waiver (moreover, the lower courts correctly found that appellant, who has minimal brain dysfunction and borderline intelligence, did not meet the statutory definition of "developmentally disabled").
Supreme Court; State ex rel A.B., A-25 Sept. Term 1987; per curiam opinion; decided January 27, 1988.

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Upon a grand jury no-bill of the murder charge on which waiver of Family Part jurisdiction had been based, the Law Division had jurisdiction, both inherently and by statute, to transfer back to the Family Part the lesser charges arising out of or related to the same transaction for redetermination as to waiver.
Appellate Division; State ex rel J.H., A-695-87T5; opinion by **Furman**, P.J.A.D.; decided February 19, 1988; approved March 4, 1988; in Opinion Approved column March 17, 1988.

121 N.J.L.J. Index Page 918.

LABOR LAW

Peaceful distribution of handbilling not prohibited by secondary boycotting.
Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 86-1461, U.S. Supreme Court on Writ of Certiorari to the U.S. Court of Appeals for the 11th Circuit, April 20, 1988.

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Railway Labor Act does not entitle operating engineer to minority union representation at company-level disciplinary proceedings.
Landers v. National Railroad Passenger Corp., 86-2037, U.S. Supreme Court on Writ of Certiorari to the U.S. Court of Appeals for the First Circuit, April 27, 1988.

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The approach in *Bridgett*, rather than the approach in *Vevoda* (which is factually distinguishable anyway) is agreed with here; if the union seeks to enforce in the courts of New Jersey a disciplinary fine where the members assert involuntary membership allegedly flowing from misrepresentations about their obligation to remain in the union, the doctrine of primary NLRB jurisdiction does not preclude the state court from entertaining the defense, and it must be considered on the merits.
Appellate Division; Local 827, Int'l Brotherhood of Electrical Workers v. Trad et al, A-2440-86T7; opinion by **Stern**, J.A.D.; decided March 11, 1988; approved April 4, 1988; in Opinions Approved column April 14, 1988.

121 N.J.L.J. Index Page 1219.

For willful violation to occur under the Fair Labor Standards Act, employer must have known or shown reckless disregard as to whether its conduct was prohibited.
McLaughlin v. Richland Shoe Company, 86-1520, U.S. Supreme Court on Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit, May 16, 1988.

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LANDLORD AND TENANT
(See also **Attorneys' Fees**)

By not getting his regularly scheduled injection, defendant allowed himself to become psychotic, in which state he damaged the landlord's premises; this was "gross negligence" under N.J.S.A. 2A:18-61.1(c) and the landlord is granted judgment for possession.
Law Division; Special Civil Part; Stuyvesant Assoc. v. Doe, T-789556; opinion by **Fast**, J.S.C.; decided October 5, 1987; approved November 30, 1987.

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An "owner," as used in N.J.S.A. 2A:18-61.1(1)(3), includes one who has a 25% interest in a two-family house and plaintiff, who wishes (with the consent of the owners of the 75% interest) to live in one of the apartments, now occupied by a month-to- month tenant, is granted judgment for possession.
Law Division; Special Civil Part; Cima v. Elliott, T-008869-87; opinion by **Eichen**, J.S.C.; decided January 25, 1988; approved February 5, 1988; in Opinions Approved column April 14, 1988.

121 N.J.L.J. Index Page 1163.

The resident owner of a building containing two other units, one of which is rented as a commercial use and the other as a residential use, may evict the residential tenant under N.J.S.A. 2A:18.61(1) for any reason or for no reason at all; the reasoning of *Cabrera v. Mordaw* is not embraced here.
Law Division, Special Civil Part; Causey et al v. Sterling, T-008738-87; opinion by **Eichen**, J.S.C.; decided January 25, 1988; approved February 5, 1988; in Opinions Approved column April 14, 1988.

121 N.J.L.J. Index Page 1166.

LANDLORD AND TENANT — RENT CONTROL

Under its rent-control ordinance, the municipality's rent-leveling board has jurisdiction over this tenant's complaint of overpayment of rent for the summer months when her apartment had no air-conditioning.
Law Division, Special Civil Part; Sierchio v. 772 Broad Street, Inc., SC 95434; opinion by **Fast**, J.S.C.; decided November 6, 1987; approved January 14, 1988.

121 N.J.L.J. Index Page 429.

LANHAM ACT

15 U.S.C. § 125(a) (1982) Unprivileged imitation of Product Appearance — Scope of Review of District Court's Finding on Likelihood of Confusion.
American Home Products Corporation v. Barr Laboratories Inc. and L. Perrigo Company, No. 87-5253, Appeal from the U. S. District Court for the District of New Jersey to the U.S. Court of Appeals for the Third Circuit, Slip Opinion Dec. 2, 1987.
Before: **Seitz, Hutchinson** and **Aldisert**, Circuit Judges. Opinion delivered by **Seitz**, Circuit Judge.

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LAW OF THE CASE (See **Defamation**)

LIENS — REAL PROPERTY

The recorded "declaration of covenants" stating that unpaid assessments are liens on properties in a community development, which has common areas maintained by plaintiff association, provided notice to defendant purchaser of one of the homes where the seller had not paid the assessment or informed him of it, and this action to foreclose the lien was an appropriate procedure to enforce it (the purchaser can recover against the seller).
Chancery Division; Rittenhouse Park Community Ass'n v. Kalzenbeen, F-2221-87; opinion by **Haines**, A.J.S.C.; decided November 17, 1987; approved March 24, 1988; in Opinions Approved column March 31, 1988.

121 N.J.L.J. Index Page 1063.

LIMITATIONS OF ACTIONS
(See also **Civil Procedure, Infancy**)

Since a suit by the worker who was injured in a car accident, while engaged in his employer's business, against the driver of the other car would be time barred, so is a suit against the driver by the subrogated workers' compensation carrier.
Law Division; Glass v. Spalts, W-01395-86; opinion by **Weinstein**, J.S.C.; decided July 31, 1987; approved December 31, 1987.

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LIMITATIONS OF ACTIONS — MORTGAGES

The country club's request for cancellation of its 1930 mortgage, which secures the only remaining bondholder's bonds, is dismissed because the moral obligation to pay the debt must be honored before such relief can be obtained; furthermore, the debt has been revived by payments on account after the period of limitations expired.
Chancery Division; Burlington County Country Club v. Midlantic National Bank South et al, C-11576-87; opinion by **Haines**, A.J.S.C.; decided December 14, 1987; approved February 24, 1988.

121 N.J.L.J. Index Page 739.

LIMITATIONS OF ACTIONS — MUNICIPALITIES

The discretion vested in courts under R. 4:69-6(c) to enlarge the ordinarily applicable 45-day limitation within which certain actions of municipal governing bodies may be reviewed should be exercised here, where plaintiffs assert no private interest in their challenge to a "consulting" contract, but rather seek vindication of the public interest, and the descriptions of the proposed public action could have been more specific.
Supreme Court; Reilly et al v. Brice et al, A-67 Sept. Term 1987; opinion by **O'Hern**, J.; decided March 22, 1988.

121 N.J.L.J. Index Page 860.

There appears to be no statutory limitation for prosecuting an ordinance violation but, by analogy to disorderly persons offenses, the one-year period of limitations in N.J.S.A. 2C:1-6(2) is held to apply to violations of municipal ordinances under 40:49-5.
Appellate Division; Caldwell Terrace Apts., Inc. v. Borough of Caldwell et al, A-3516-86T7; opinion by **Dreier**, J.A.D.; decided April 14, 1988; approved April 20, 1988; in Opinions Approved column May 19, 1988.

121 N.J.L.J. Index Page 1452.

LIMITATIONS OF ACTIONS — TAX FORECLOSURES

The statute of limitations that applies to an action to vacate an in rem tax-foreclosure judgment is N.J.S.A. 54:5-104.67, not 54:5-90 (which limits to five years collateral attacks on in personam tax-foreclosure judgments) and the trial court should not have dismissed this suit to vacate an in rem judgment entered in 1981; on remand, plaintiffs may offer proofs, in support of their claim of lack of jurisdiction, that someone acting for the borough had actual or constructive knowledge of the correct address of the then owner of the property, and the borough (which has retained title) may offer proofs that this proceeding was not instituted within a reasonable time.
Appellate Division; Sourlis v. Red Bank, A-3319-86T7; opinion by **Furman**, P.J.A.D.; decided October 13, 1987; approved October 28, 1987.

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LIMITED-DIVIDEND HOUSING CORPORATIONS

N.J.S.A. 55:16-6 requires that a limited-dividend housing corporation be formed in the manner of a Title 14A corporation, and 14A:5-21(1) provides that shareholders may agree that they will vote to elect directors named by a class of non-shareholders such as, here, the township council; the trial judge correctly decided that the council properly appointed plaintiff's successor to the HFA-financed senior-citizens housing association.
Appellate Division; Delspina v. Woscha, Inc. et al, A-3371-86T5; opinion by **Brody**, J.A.D.; decided January 19, 1988; approved February 9, 1988.

121 N.J.L.J. Index Page 804.

LIS PENDENS

A notice of lis pendens may not be filed against a property interest (here, a recorded mortgage) of a person who is not a defendant in the lawsuit from which the notice emanates.
Chancery Division; Spyco, Inc. v. Domenus et al, C-2799-87; opinion by **McGann**, J.S.C.; decided January 21, 1988; approved March 10, 1988; in Opinions Approved column March 24, 1988.

121 N.J.L.J. Index Page 1064.

LONG-ARM JURISDICTION

A more complete record may show that *Serbin* should be reconsidered; defendant's national television advertising may, by successfully enticing people from New Jersey to visit its Florida resort (where one of its employees allegedly assaulted the infant plaintiff), create sufficient contacts in N.J. to justify in personam jurisdiction, and the matter is remanded for further discovery.
Appellate Division; Maisopoulos v. Walt Disney World, Inc. et al, A-3106-85T8; opinion by **Bilder**, J.A.D.; decided December 10, 1987; approved January 11, 1987.

121 N.J.L.J. Index Page 422.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Liability of Vessel for Unloading Operations.
Derr (appellant) v. Kawasaki Kisen K.K.; and Robertson v. Tokai Shosen K.K., Nos. 86-1772 and 87-1031, Decided Dec. 15, 1987.
On appeal to the United States Court of Appeals for the Third Circuit from the United States District Court for the Eastern District of Pennsylvania.
Opinion by **Sloviter**, Circuit Judge.

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MALICIOUS INTERFERENCE

It makes no difference if an alleged threat to adversely affect an agreement to which plaintiff is a party, directly affecting plaintiff's rights under it, was not directly addressed to plaintiff; however, the clear absence of any damage to plaintiff resulting from the alleged threat by defendants to initiate a federal tax audit vitiates plaintiff's complaint for malicious interference.
Appellate Division; Norwood Easthill Assoc. v. Norwood Easthill Watch et al, A-3375-86T7; opinion by **Shebell**, J.A.D.; decided February 2, 1988; approved February 8, 1988.

121 N.J.L.J. Index Page 735.

MALICIOUS PROSECUTION

If defendant withdrew the criminal complaint he had filed against plaintiff independently and unilaterally (not, as in *Morrow*, because of a compromise), the underlying criminal action may be considered to have "terminated favorably to plaintiff"; this matter is remanded for a resolution of the factual dispute regarding that essential element of an action for malicious prosecution.
Appellate Division; Piper v. Schor, A-4479-86T5; opinion by **Scalera**, J.A.D.; decided October 29, 1987; approved November 25, 1987.

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MALICIOUS PROSECUTION — SURVIVAL ACT

Since *Canino* held that a defamation action survives the death of the plaintiff under the Survivial Act, it is logical to conclude that this action for malicious prosecution survived plaintiff's death; the summary judgment granted defendants is reversed.
Appellate Division; Fricke et al v. Geladaris, Inc. et al, A-3255-86T5; opinion by **Havey**, J.A.D.; decided October 29, 1987; approved November 25, 1987.

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MANSLAUGHTER

The killing of innocent bystanders does not qualify as a homicide incited by provocation.
Appellate Division; State v. Lewis, A-1778-85T-4; opinion by **Ashbey**, J.A.D.; decided February 24, 1988; approved March 4, 1988; in Opinions Approved column March 17, 1988.

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Under *Ramseur* and *Breakiron*, the lesser included offenses of aggravated manslaughter and manslaughter should have been charged here, where evidence was presented that defendant was suffering an epileptic seizure when he stabbed his wife to death and the jury could have concluded that he had not acted "purposely" but had acted with a "conscious disregard of a substantial and unjustifiable risk."
Appellate Division; State v. Washington, A-2328-85T4; opinion by **Skillman**, J.A.D.; decided March 2, 1988; approved March 23, 1988; in Opinions Approved column March 31, 1988.

121 N.J.L.J. Index Page 1111.

MATRIMONIAL LAW
(See also **Attorneys' Fees, Choice of Law** and **Forum Non Conveniens**)

Under N.J.S.A. 2A:17-51.7 et seq. (passed in response to Congress' Child-Support Enforcement Amendments of 1984) the definition of "income" includes commissions, and the company with which plaintiff-husband is associated as an independent contractor must honor the income-withholding notice served on it by court order after he had failed to pay the agreed-on child support; to allow the company to set off plaintiff's earned commissions against what he owed it for advances against future commissions would run contrary to the strong public policy of enforcing child-support obligations.
Chancery Division, Family Part; Galpen v. Galpen, FM-3443-80; opinion by **Weiss**, J.S.C.; decided July 22, 1987; approved November 19, 1987.

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Although this case involves a joint custody agreement it is not distinguished from *Cooper* because, for removal purposes, the parent with physical custody should be considered the custodial parent; the order permitting the remarried mother to move with the children to El Salvador, where her new husband works, and providing for vacation trips to see the father at the mother's expense is affirmed, but the termination of the father's duty to pay child support simply because the children will not be available for visitation while in El Salvador is reversed.
Appellate Division; Santucci v. Santucci, A-4737-86T5; opinion by **O'Brien**, J.A.D.; decided December 22, 1987; approved January 14, 1988.

121 N.J.L.J. Index Page 423.

A pension is includable for equitable distribution, regardless of whether it has vested, if it is acquired during the marriage; includability of property in the marital estate does not depend on when, during the marriage, the acquisition took place(here, for example, when the pension vests), but on the nature of the interest and how it was earned or acquired; *Barba v. Barba*, holding that an unvested pension is not includable, is an anomaly in the law of equitable distribution.
Appellate Division; Whitfield v. Whitfield, A-1467-85T7; opinion by **Long**, J.A.D.; concurrence b y **D'Annunzio**, J.A.D.; decided December 18, 1987; approved January 14, 1988.

121 N.J.L.J. Index Page 469.

Here, where the parties reconciled and lived together (both contributing to household expenses) for seven years after the judgment of divorce, which incorporated a property settlement, the $6,000 plaintiff wife was to receive from defendant husband for her share of the marital residence in 1979 is calculated as 20% of the value of the house; since that value has increased from $30,000 to $105,000, she should receive $21,000.
Chancery Division; Brown v. Brown, FM-25499-77; opinion by **Cooper**, J.S.C.; decided October 2, 1987; approved January 27, 1988.

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Since the three-year-separation cause of action on which the Pennsylvania divorce was ultimately granted to the husband had not ac-

crued when he filed the complaint on October 13, 1982, and in New Jersey such an "unmeritorious" complaint is subject to dismissal, that date should not be used to mark the end of the marriage for the purpose of equitable distribution in N.J.; January 25, 1984, the date the wife filed for divorce alleging fully accrued causes of action, is fixed as the termination date.
Appellate Division; Zappala v. Zappala, A-4530-86T5; opinion by Gaulkin, J.A.D.; decided January 5, 1988; approved January 22, 1988.

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To reform a matrimonial agreement, there must be clear and convincing proof that the contract as reformed is what the parties understood and meant it to be, and the trial judge properly found that defendant did not meet that burden here; moreover, relief from an equitable-distribution agreement incorporated in a divorce judgment is subject to R. 4:50-2, and defendant's application ten years later is also time-barred.
Appellate Division; Capanear v. Salzano, A-4517-86T8; opinion by Gaynor, J.A.D.; decided February 2, 1988; approved February 9, 1988.

121 N.J.L.J. Index Page 735.

The court's equitable powers under *Minkin* are not limited to situations involving adultery by the former wife; plaintiff, who sought the "no-fault" divorce from defendant and has remarried, can be compelled to submit to the jurisdiction of the Jewish ecclesiastical court to assist defendant in securing a Jewish bill of divorcement (a "get"), so that she can remarry in accordance with Jewish law.
Chancery Division, Family Part; Burns v. Burns, FM-04-08884-81; opinion by Natal, P.J.F.P.; decided December 4, 1987; approved February 24, 1988.

121 N.J.L.J. Index Page 738.

Under the New Jersey Support Enforcement Act the remedy of a wage execution "shall" issue only where the arrearages equal the amount payable for 14 days, and it was improper to issue one where the probation department received defendant's consistently late payments within 14 days after each was due; also, the fact that several checks were 69¢ short is not enough to invoke the income-withholding provisions of N.J.S.A. 2A:17-56.9.
Appellate Division; Slater v. Slater, A-3215-86T1; opinion by Michels, P.J.A.D.; decided January 19, 1988; approved February 9, 1988; in Opinions Approved column April 14, 1988.

121 N.J.L.J. Index Page 1160.

N.J.S.A. 2A:34-25 requires the termination of rehabilitative alimony (as opposed to reimbursement alimony) upon the remarriage of the recipient spouse.
Chancery Division; Smith v. Smith, M-01390-86; opinion by Epstein, P.J.F.P.; decided January 19, 1988; approved April 18, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1357.

Under the nonsupersession provision of the Uniform Reciprocal Enforcement of Support Act, a responding state may modify a support order of an initiating state solely for the purpose of enforcement in the responding state, and the order's enforceability in the initiating state is not affected by that modification; the agreement between the Tennessee district attorney and defendant-husband to reduce his support obligation and to fix the arrears at substantially less than the two New Jersey judgments is only (if at all) effective for the purpose of enforcement in Tenn., and defendant's arrears under the N.J. order have not been vacated.
Appellate Division; Banks v. Banks, A-1945-86T7; opinion by Furman, P.J.A.D.; decided November 25, 1987; approved December 14, 1987.

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MEDICAID — DISABILITY

The Division of Public Welfare (DPW) is not under an obligation to decide a disability claim for "Medicaid Only" benefits once the Social Security Administration (SSA) has made its own determination within the year preceding the application to the DPW that the applicant is not disabled for purposes of receiving Supplementary Security Income (SSI) benefits.

Fratone et al v. Division of Public Welfare et al; Civil No. 87-2569; opinion by Sarokin, U.S.D.J.; filed February 8, 1988.

121 N.J.L.J. Index Page 812.

MEDICAL MALPRACTICE
(See also **Informed Consent** and **Jurisdiction**)

The battery theory should be reserved for where a patient consented to one kind of operation and the physician performed a substantially different one, and the trial court correctly refused to charge it here; where unexpected events arise in the course of an operation, the conduct of the physician should be judged in accordance with negligence principles relating to informed consent and, absent proof to the contrary, the consent given (express or implied) should be construed to authorize physicians to employ surgical procedures that in their professional judgment are reasonably necessary to remedy the patient's condition.
Appellate Division; Samoilov v. Raz, A-1922-86T7; opinion by Baime, J.A.D.; decided December 23, 1987; approved January 22, 1988.

121 N.J.L.J. Index Page 521.

There is no support for the belief that a newborn child may be put to death through benign neglect on the mere expectation that she will, in some unquantified way, be a defective person, and the trial court correctly dismissed plaintiffs' suit to recover for the "wrongful life" of their child, and the cost of caring for her in a state of total disability, based on an operation they had consented to as essential to her survival without being told of her "extremely poor" intellectual and neurological prognosis; even if they had been told of it and had refused to consent to the operation, the hospital would have obtained court approval to proceed.
Appellate Division; Infolice v. Zarafu et al, A-4118-86T8; opinion by Antell, P.J.A.D.; decided November 23, 1987; approved December 7, 1987.

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MERGER
(See also **Arson**)

The Law Division's decision reversing the merger of defendant's convictions for operating a motor vehicle while in possession of marijuana, contrary to N.J.S.A. 39:4-49.1, and possession of less than 25 grams of marijuana, contrary to N.J.S.A. 24:21-20(a)(4), is affirmed; even assuming that the two offenses might merge if defendant's application for conditional discharge had been denied, there is nothing inappropriate or unfair about entry of judgment upon sentencing for an offense that might otherwise merge but for enrollment in the diversion or supervisory treatment program.
Appellate Division; State v. Newman, A-5548-86T4; per curiam (Judges Coleman and Stern) opinion; decided February 24, 1988; approved March 4, 1988; in Opinions Approved column March 17, 1988.

121 N.J.L.J. Index Page 924.

MINORS — INSURANCE — WORKERS' COMPENSATION
(See also **Attorneys' Fees**)

The provision in the Blue Cross/Blue Shield contract excluding from coverage treatment that is rendered for an injury arising out of the course of employment for which benefits are "available" under the workers' compensation law does not apply to an injured minor (covered by Blue Cross/Blue Shield under his father's coverage) who exercises his statutory election to pursue a common-law tort remedy against his employer in lieu of a compensation claim; summary judgment for plaintiff is affirmed.
Appellate Division; La Pollo v. Hospital Service Plan of N.J. et al, A-1289-86T8; opinion by Pressler, P.J.A.D.; decided October 5, 1987; approved October 16, 1987.

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MORTGAGES
(See also **Limitations of Actions**)

The mortgagee did not undertake any duty to inspect or warrant the condition of the mortgaged property by demanding a (temporary) certificate of occupancy and an inspection certificate.
Appellate Division; Rzepiendk v. U.S. Home Corp. et al, A-2117-86T8; opinion by Gaulkin, J.A.D.; decided November 24, 1987; approved December 11, 1987.

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MOTOR VEHICLES — PENALTIES
(See also **Drunk Driving**)

In the case of one convicted under N.J.S.A. 39:3-40 whose license had been revoked because of a conviction for drunk driving, the punishment authorized by the language following "Notwithstanding" in (e) shall be imposed instead of (not in addition to) the punishment authorized by (a)-(d).
Law Division; State v. Rought, App. 121-87; opinion by Pepe, J.S.C.; decided September 8, 1987; approved October 27, 1987.

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The last paragraph of N.J.S.A. 39:3-40, which begins with the ambiguous word "notwithstanding," is construed here to intend a supplementary, permissive penalty, for those with a previous DWI conviction, beyond the 45 days in the county jail mandated by subsection e (for operating a vehicle while one's license is revoked and being involved in an accident resulting in personal injury to another) of up to but no more than 90 days in all.
Appellate Division; State v. Wrotny, A-2949-86T4; opinion by King, P.J.A.D.; decided November 23, 1987; approved December 7, 1987.

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MUNICIPALITIES (See **Counties, Limitations**)

MUNICIPAL LAND USE
(See also **Collateral Estoppel, Environmental Protection** and **Free Speech**)

The interpretation of a zoning ordinance is essentially within the province of the courts; *Alston*, which held that judicial review of a board of adjustment's interpretation of a zoning ordinance pursuant to the 1984 amendment of N.J.S.A. 40:55D-70(b) is limited to whether it was arbitrary, capricious or unreasonable, is overruled.
Given the general understanding of the nature of a "residential-office" zone, the commercial uses conditionally permitted by this ordinance in such a zone, as part of a mixed residential and commercial use, is construed here as not including retail stores; the planning board should not have approved defendant's application to establish a retail store in the borough's "residential-office" zone.
Appellate Division; Gruscagnola et al v. Verona Tp. Planning Bd. et al, A-4141-86T5; opinion by Skillman, J.A.D.; decided November 2, 1987; approved November 25, 1987.

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N.J.S.A. 40:55D-10.3 requires a checklist adopted by ordinance precisely so that additional requirements for a "complete" application cannot be tacked on by planning boards; here, where the board did not act within the statutory time limit on plaintiff's application for minor-subdivision approval (which included all the items in the checklist) because he had not complied with two planning board resolutions, his application is deemed approved.
Law Division; Purwin v. Bernards Tp. Planning Bd. et al, L-50066-87 PW; opinion by Ross, J.S.C.; decided July 1, 1987; approved November 17, 1987.

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The appellate decision in *Rickel* would reverse an otherwise valid grant of a variance by a board of adjustment notwithstanding the failure of the governing body to muster the "enhanced majority" vote required by N.J.S.A. 40:55D-17e (a majority of the full authorized membership); in the face of a clear legislative intent to grant more power to boards of adjustment, it must be concluded here that the Legislature intended that a reversal be compelled only by an enhanced-majority vote, and the four-to-three vote of this nine-member governing body to reverse thus constituted failure to "reverse, remand or affirm" by an enhanced-majority vote within 95 days from publication of the notice of the grant of the variance by the board of adjustment, resulting in an automatic affirmance.
Appellate Division; Preakness Hill, Inc. v. Wayne Tp. A-3661-86T1; opinion by Shebell, J.A.D.; dissent by Michels, P.J.A.D.; decided November 19, 1987; approved December 2, 1987.

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Here, where occupancy is by one three-generation family whose members maintain constant significant contacts in the home, the addition of a second kitchen, without more, does not create a two-family house; *Rowatti* is distinguished.
Appellate Division; Cherney v. Matawan Zoning Bd. of Adjustment, A-1567-86T1; opinion by Cohen, J.A.D.; decided November 18, 1987; approved December 7, 1987.

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It would violate the strong judicial policy in New Jersey of limiting and discouraging the extension of nonconforming uses to allow this summer hotel and restaurant in the borough's most restricted residential zone to become a year-round operation, and the Law Division judge erred in reversing the zoning board's denial of plaintiff's application.
Appellate Division; Coa-Lin, Inc. v. Spring Lake Borough et al, A-3217-86T8; opinion by King, P.J.A.D.; decided November 18, 1987; December 7, 1987.

121 N.J.L.J. Index Page 204.

The relationship of the ten young men who live together in one house while they attend college can be described as the functional equivalent of a family, qualifying the house as a valid single-family residence under plaintiff's ordinance.
Chancery Division; Glassboro v. Vallorosi et al, C-5326-86; opinion by Miller, J.S.C.; decided March 17, 1987; approved May 6, 1987 [affirmed, A-3947-86, March 9, 1988].

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Some of the procedures that have caused unnecessary delay in processing these *Mt. Laurel* applications, such as lengthy, repetitive cross-examination of experts by members of the public, must be corrected by the planning board itself, but the barrier the board has erected to informal communications between its experts and the applicants' experts can and will be enjoined, and an outer limit will be placed on the time the board takes to decide pending applications.
Law Division; Morris Cty. Fair Housing Council et al v. Boonton Tp. et al, L-6001-78 P.W.; opinion by Skillman, J.S.C.; decided May 1, 1987; approved September 17, 1987.

121 N.J.L.J. Index Page 427.

The planning board has unbridled discretion (barring conflicts of interest) to select an engineer of its choice notwithstanding directives from the governing body that it use the municipal engineer's services, and the borough council may not usurp the board's separately delegated power of appointment by failing to continue funding the position of board engineer.
Law Division; Leonia Planning Bd. v. Leonia Borough Council, L-35704-87 PW; opinion by Stark, J.S.C.; decided September 30, 1987; approved January 25, 1988.

121 N.J.L.J. Index Page 475.

Here, where the municipality simultaneously planned for open space and zoned for residential use, the ordinance rezoning plaintiff's property for two 100-foot lots (instead of the four 50-foot lots that still applied to the surrounding properties) did not have a valid zoning purpose; as the objective facts make clear, the sole purpose was to reduce the value of plaintiff's property so that the municipality could acquire it for open space below fair market value, and the ordinance is therefore invalid as unreasonable and arbitrary.
Supreme Court; Riggs et al v. Long Beach, A-9 Sept. Term 1987; opinion by Pollock, J.; concurrence by Handler, J.; decided March 23, 1988.

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Where a boundary line transected property located in two municipalities and the property's unique topography, as well aesthetics, prevented moving the proposed location of the house closer to the front property line, and the location satisfied the negative requirements of N.J.S.A. 40:55D-70, the rear-yard set-back requirements of defendant municipality are held to refer to the distance from the house to the rear-lot line, rather than to the closer municipal boundary line.
Appellate Division; Ciocon et al v. The Planning Board of the Borough of Franklin Lakes, A-2985-86T8; opinion by Deighan, J.A.D.; decided March 1, 1988; approved March 11, 1988.

121 N.J.L.J. Index Page 981.

A developer who was required by the municipality to install a water line as a condition for subdivision approval was not precluded from relief when he instituted an action prior to constructing the line to compel the planning board to make a pro-rata allocation of its costs, but completed construction prior to a judicial resolution of the matter; additionally, N.J.S.A. 40:55D-42 gives a developer who constructs an improvement the same right to institute a suit as a developer who pays a determined amount to the municipality.
Appellate Division; Baltica Construction Co., Inc. v. Franklin Tp. Planning Bd., A-3443-86T1; opinion by Havey, J.A.D.; decided February 5, 1988; approved February 22, 1988.

121 N.J.L.J. Index Page 990.

Trial courts hearing *Mt. Laurel* cases that have not been transferred to the Council on Affordable Housing should follow the Council's fair-share methodology unless it is shown to be arbitrary or capricious, and the municipality has not shown that here.
Law Division; Bi-County Development Corp. v. Mayor and Council of Oakland et al, L-022851- 87 P.W.; opinion by Skillman, J.S.C.; decided February 29, 1988; approved April 15, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1356.

Where the township approved the filing of a plat and accepted the dedication of an undersized lot designated as a street, and a subsequent owner deeded the lot to the township expressly to dedicate it as a public street, before selling it the township is required by N.J.S.A. 40:67-19 to adopt an ordinance, after notice and a hearing, vacating the dedication, so the sale at public auction is ultra vires and void; furthermore, the township is required by 40A:12-13.2 to accord the contiguous owners the right of prior refusal to purchase the undeveloped undersized lot.
Appellate Division; Englander et al v. West Orange et al, A-4829-86T1; per curiam (Judges Petrella and Baime) opinion; decided April 15, 1988; approved April 20, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1405.

MUNICIPAL LAND USE — RELIGION

The total exclusion of churches and places of worship from residential districts violates the New Jersey Constitution's guarantee of religious freedom; the municipality can impose reasonable restrictions on plaintiff's site plan

but cannot totally exclude plaintiff's proposed use.

Law Division; Jehovah's Witnesses Assembly Hall of Southern N.J. v. Woolrich Township et al, L-57876-86 P.W.; opinion by **Miller**, J.S.C.; decided April 20, 1987; approved September 17, 1987; in Opinions Approved column February 18, 1988.

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Whether a municipality can, through its zoning power, exclude places of worship from residential zones is an open question in New Jersey, and the Law Division's broad and absolute rule in this case that total exclusion violates New Jersey's constitutional guarantee of freedom of religion is reversed; the matter is remanded for a thorough exploration and careful evaluation of the facts bearing on the competing religious and governmental interests involved.

Appellate Division; Jehovah's Witnesses Assembly Hall of Southern New Jersey v. Woolwich Township et al, A-4894-86T8; per curiam (**Judges King, Gaulkin** and **Gruccio**) opinion; decided February 19, 1988; approved March 4, 1988; in Opinions Approved column March 17, 1988.

121 N.J.L.J. Index Page 867.

MULTIPLE DWELLINGS — NOTICE —

The legislative purpose could not be achieved if the notice required by N.J.S.A. 55:13A-18, giving an owner 15 days to request a hearing on an order to abate violations of the Hotel and Multiple Dwelling Law, meant actual notice; the service provisions of 55:13A-20 provide notice sufficient to satisfy constitutional due process.

Appellate Division; Svilukos v. Dept. of Community Affairs, A-2434-86T6; opinion by **Bilder**, J.A.D.; decided October 14, 1987; approved October 28, 1987.

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NEGLIGENCE

Section 323(a) of the *Restatement of Torts* assumes that a nexus between the increased risk and the negligence has been established, and the difficulty in this case in identifying the negligent causative act does not justify applying that section's more flexible standard of causation; there was no evidence that defendant caused the harm to plaintiff, and the trial court correctly dismissed this complaint at the end of plaintiff's case.

Appellate Division; Peiose v. Green et al, A-2313-86T8; opinion by **Bilder**, J.A.D.; decided February 16, 1988; approved March 3, 1988.

121 N.J.L.J. Index Page 863.

NEGLIGENCE — WORKERS' COMPENSATION

Where, as here, the contractor's responsibility to safeguard invitees from the dangerous condition it has created is express and manifest, allowing a third party (which was successfully sued by the contractor's employee) to recover damages from the contractor based on the breach of its agreement to safeguard its employees from harm during the performance of the contract on the third party's property does no violence to the policy and purposes of the Workers' Compensation Act.

Appellate Divison; Port Authority of New York and New Jersey v. Honeywell Protective Services, Inc., A-1512-86T7; opinion by **Baime**, J.A.D.; decided October 16, 1987; approved October 28, 1987.

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NEW-HOME WARRANTIES

The Legislature did not intend to extend the protections of the New Home Warranty and Builders' Registration Act to buyers of remodeled or rehabilitated houses, and the certificate of participation in the New Home Warranty Security Fund given plaintiffs by the builder and validated by the Bureau of Construction Code Enforcement/New Home Warranty Program before its investigation revealed that plaintiffs' house was not entirely new, but instead had been substantially repaired after major fire damage, was properly cancelled.

Under N.J.A.C. 5:25-3.1a, a new home can qualify for warranty protection under the New Home Warranty and Builders' Registration Act only where a builder first transfers title or a builder-owner gives possession for the first time; where, as here, title passes from homeowner to homeowner, even an entirely new house would not qualify.

Appellate Division; Glaum v. Dept. of Community Affairs, A-1763-86T1; opinion by **Coleman**, P.J.A.D.; decided November 6, 1987; approved November 23, 1987.

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A homeowner who elects to arbitrate, rather than litigate, his claims against the builder of his new home, pursuant to a homeowner's warranty, is barred from seeking additional relief in the courts by N.J.S.A. 46:3B-9, AAA rules, and principles of res judicata.

Appellate Division; Rzeplenski v. U.S. Home Corp. et al, A-2117-86T5; opinion by **Gaulkin**, J.A.D.; decided November 24, 1987; approved December 11, 1987.

121 N.J.L.J. Index Page 307

NO FAULT

Since the Legislature has not authorized insurers to contractually limit PIP benefits by territorial exclusion, any attempt to do so is of no binding effect; the trial court's decision that defendant must pay for all the medical expenses plaintiff has incurred because of the accident to the car in which she was riding while on vacation in Hungary is affirmed.

Appellate Division; Harmsen v. Rutgers Casualty Ins. Co., A-310-86T1; opinion by **Scalera**, J.A.D.; decided November 19, 1987; approved December 2, 1987.

121 N.J.L.J. Index Page 206.

Each car's PIP policy is responsible for the car's passengers and for the family of its owner, and the insurer of the non-owner driver of the uninsured car is not required to afford PIP coverage to the passenger, who is not a member of the insured driver's family; the passenger must look to the host car or (if it is uninsured) to the Unsatisfied Claim and Judgment Fund for PIP protection.

Supreme Court; Sotomayor et al v. Vasquez et al, A-6 Sept. Term 1987; opinion by **O'Hern**, J.; decided January 26, 1988.

121 N.J.L.J. Index Page 453.

As an abstract question, the presence of a responsible third-party tortfeasor does not of itself make a passenger in an uninsured motor vehicle ineligible to receive PIP benefits from the UCJF; in most cases, the Fund will be in the best position to evaluate the practicalities of any reimbursement or subrogation claim where a settlement was exclusive of "PIP-type" damages, or to disallow recovery if a settlement duplicates recovery for such items as lost wages or medical specials.

Supreme Court; Wilson v. Unsatisfied Claim and Judgment Fund Bd., A-5 Sept. Term 1987; opinion by **O'Hern**, J.; decided January 26, 1988.

121 N.J.L.J. Index Page 466.

The PIP protection afforded the named-insured lessor (whether the ownership is corporate or individual) of a vehicle is not afforded a lessee, and this action against the lessor's carrier by a lessee, who was injured by another car while walking after he had parked the leased car, is dismissed.

Appellate Division; Healey v. Allstate Insurance Co. et al, A-2137-86T8; opinion by **Dreier**, J.A.D.; decided March 8, 1988; approved March 18, 1988; in Opinions Approved column March 31, 1988.

121 N.J.L.J. Index Page 1109.

NOTICE (See **Multiple Dwellings**)

OIL & GAS

State regulation of gas company securities preempted.

Schneidewind v. ANR Pipeline Co., 86-1988, U.S. Supreme Court on appeal from the Sixth Circuit, March 22, 1988.

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OSHA — WRONGFUL DISCHARGE

Although the OSHA statute provides that only the Secretary of Labor can assert a claim under its provisions, it does not prohibit a private right of action under a recognized tort or contract theory; since there is a strong public policy in New Jersey favoring safety in the workplace, plaintiff may maintain this *Pierce* action for retaliatory discharge for filing an OSHA complaint.

Appellate Division; Cerracchio v. Alden Leeds Inc., A-3020-86T1; opinion by **Long**, J.A.D.; decided March 7, 1988; approved March 31, 1988; in Opinions Approved column April 7, 1988.

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PAROLE

"Reconvening" defendant's parole-revocation hearing prior to any final determination or adjudication on the merits did not violate any of his constitutional or statutory rights.

Appellate Division; Parole Board v. Maunson, A-2554-86T6; opinion by **Stern**, J.A.D.; decided November 4, 1987; approved November 12, 1987.

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The Parole Act of 1979, which gives the State Parole Board the discretion to enter into parole agreements for a reduction of terms or parole-eligibility dates with parolees or inmates who have demonstrated exceptional progress, provides that if such a contract-parole program is implemented all parolees and inmates shall be permitted to apply (subject to uniform regulation); N.J.A.C. 10A:71-3.5, which provides that an inmate must be within two-and-a-half years of parole eligibility to decrease his parole-eligibility date, does not violate the legislative intent of N.J.S.A. 30:4-123.52(b), which does not contain such a restriction.

Appellate Division; Raymond v. State Parole Board, A-1418-86T6; opinion by **Landau**, J.A.D.; decided December 8, 1987; approved December 16, 1987.

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An inmate who has been approved for parole does not have a due process right to be automatically released merely because a rescission hearing is held 65 days, rather than 60 days, from the parole-release date.

Although the wiretapped conversations of criminal activity need not be presented at a rescission hearing, the witness to the conversations should accurately recount them in order for the board to ascertain the reliability of the evidence.

Appellate Division; Gerardo v. State Parole Bd., A-4175-86T8; opinion by **Conley**, J.S.C. (t/a); decided December 9, 1987; approved December 23, 1987.

121 N.J.L.J. Index Page 472.

PENALTIES — RENT CONTROL
(See also **Motor Vehicles**)

No statute authorizes a rent-leveling board to impose monetary penalties or imprisonment — such authority is within the exclusive power of the courts, and the board should have referred the landlord's (now corrected) omission of smoke detectors in common areas to a public officer to institute a complaint in municipal court; the penalty assessed by the board and reduced by the Law Division (on an action in lieu of prerogative writ instituted by the landlord) must be vacated.

Appellate Division; Caldwell Terrace Apts., Inc. v. Borough of Caldwell et al, A-3516-86T7; opinion by **Dreier**, J.A.D.; decided April 14, 1988; approved April 20, 1988; in Opinions Approved column May 19, 1988.

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PENSIONS

Dictum in *Hillman* that N.J.S.A. 43:15A-43 requires that an application for accidental retirement benefits for an injury suffered before age 65 be *filed* by age 65 is rejected; the claim of this petitioner, who suffered a disabling eye injury five months before his 65th birthday while working as a school custodian but did not file until four months after he was 65, when three operations had failed to restore the sight in his right eye, should be granted.

The PERS board of trustees has placed too restrictive an interpretation on *Kane*; one must look at the organ affected to determine what force is necessary to be considered traumatic, and the invasion of broom bristles in an organ as sensitive as the eye can be "a great rush of force or uncontrollable power."

Appellate Division; Dulgnan v. Bd. of Trustees, Public Employees' Retirement System, A-3447-86T1; opinion by **Dreier**, J.A.D.; decided March 3, 1988; approved March 11, 1988; in Opinions Approved column March 24, 1988.

121 N.J.L.J. Index Page 1054.

PLEA BARGAINS

Under the unusual facts of this case, where defendant attacks the sufficiency of the factual basis for his pleas of guilty to armed robbery and attempted murder, the former conviction and concurrent sentence can be sustained but, since his recollection of the assault does not establish a purposeful or knowing attempt to murder the victim, the latter is remanded for a rehearing; the trial judge may, on motion by the State, enter a conviction for second-degree aggravated assault or hear additional witnesses to provide a factual basis for the attempted-murder plea.

Appellate Division; State v. Dishon, A-4554-85T4; opinion by **Dreier**, J.A.D.; decided December 23, 1987; approved January 26, 1988.

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There is no reason why a voluntary plea agreement cannot provide for an increased sentence if the defendant fails to appear for sentencing, as long as the court does not impose the sentence automatically by virtue of the non-appearance.

Appellate Division; State v. Subin, A-5440-85T4; opinion by **Michels**, P.J.A.D.; decided January 11, 1988; approved January 22, 1988.

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PLEA BARGAINS — SENTENCING — SEX OFFENDERS

R. 3:9-2 requires trial courts, when accepting guilty pleas from sex offenders, to inform them of the possibility of a sentence to Avenel and how the parole consequences of such a sentence differ radically from those of a State Prison sentence.

Due process is satisfied by the preponderance-of-evidence standard of proof for a determination that a defendant convicted of a sex offense is a "repetitive and compulsive" sex offender who should be sentenced to Avenel.

Supreme Court; State v. Howard, A-10 Sept. Term 1987; opinion by **Pollock**, J.; decided April 19, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1052.

So long as defendant was made aware of his maximum exposure under the negotiated plea of guilty to the second-degree crime of sexual assault, and received a sentence to Avenel (three years) with no greater exposure, the plea remains unassailable; the contention that a defendant must be advised, at the time of plea, of the parole and "real time" consequences of an Avenel commitment, or of the contemplated period of parole ineligibility because it takes so long to place offenders at Avenel, is rejected. [*Ed. note:* see Supreme Court opinion in *State v. Howard* digested at 121 N.J.L.J. 1052, May 19, 1988].

Appellate Division; State v. MacAlpin, A-423-86T4; per curiam (**Judges Havey** and **Stern**) opinion; decided March 4, 1988; approved March 18, 1988; in Opinions Approved column March 31, 1988.

121 N.J.L.J. Index Page 1110.

POSSESSION (See **Trial by Jury**)

PREEMPTION (See **Environmental Protection** and **ERISA**)

PRISONS

Until some adverse effect can be proven, it would be speculative and premature to say that, on its face, the amended regulation's changed requirements — no longer requiring the testing of all new inmates in county jails for (unspecified) infectious diseases but instead requiring medical examinations by physicians and leaving to their discretion whether to order such tests — deny inmates' their constitutional rights; the amendment is upheld.

Appellate Division; Office of Inmate Advocacy v. Fauver, A-5839-85T6; opinion by **Shebell**, J.A.D.; decided February 1, 1988; approved February 16, 1988.

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PRISONERS — PSYCHOLOGISTS
(See also **Adoption** and **AIDS**)

The "legitimate penological goal" standard of *Turner* does not apply here, since regulations regarding exceptions to inmate-therapist confidentiality may violate prisoners' eighth amendment right to adequate psychological care; the disclosure of drug trafficking or of serious past crimes may not be mandated unless they present a clear and imminent danger to the inmate or other identifiable persons.

Appellate Division; in re N.J.A.C. 10A:16-4.4, A-4205-86T1; opinion by **O'Brien**, J.A.D.; decided April 4, 1988; approved April 19, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1459.

PRISONERS — RIGHT TO KNOW

The only regulation that could unquestionably sustain refusing the newspaper's request for certain records concerning eight parolees is the Dept. of Corrections Standard 281.8, which was not adopted in compliance with the Administrative Procedure Act; certain information prejudices neither the State nor inmates, and other information may also be supplied after the administrators view the requests in a more expansive manner; the sensitive material requested demonstrates the need to revise and repromulgate 281.8 under the APA, so the *McNeil* procedure will be adopted here and the procedurally defective standard will not be voided for six months.

Appellate Division; The Home News Publishing Co. v. N.J. Dept. of Corrections et al, A-117-87T8; opinion by **Dreier**, J.A.D.; decided March 9, 1988; approved March 18, 1988; in Opinions Approved column March 31, 1988.

121 N.J.L.J. Index Page 1218.

PRODUCTS LIABILITY

The manufacturers of machines used in an aerosol-packaging assembly line designed by another did not have a duty to warn each other that their machinery should be "explosion proof."

Law Division; DePrimo v. Lehn & Fink Products Co. et al, etc., L-049071-85; opinion by **Arnold**, J.S.C.; decided December 18, 1987; approved February 26, 1988.

121 N.J.L.J. Index Page 926.

Duty to Warn, Alcoholic Beverages.
Hon (Appellant) v. Stroh Brewery Company, Third Circuit Court of Appeals, No. 87-5155, filed Dec. 21, 1987.

On appeal from the United States District Court for the Middle District of Pennsylvania-Scranton.
Opinion by Stapleton, Circuit Judge.

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PRODUCTS LIABILITY — SEAT BELTS

Although at the time plaintiff's decedent died in a car accident there was no duty to wear a seat belt, evidence of the existence and recommended use of available seat belts was admissible as bearing on the risk-utility factors of the safety aspects of the car and the user's ability to avoid danger by exercising care in its use where it was claimed that the door latch had been defectively designed, allowing the decedent to be ejected from the car; however, use of that evidence required a clear instruction to the jury that the failure to wear a seat belt at that time was to be considered *only* as a factor in its risk-utility analysis and, since the jury may have believed that it could consider decedent's failure to wear a seat belt as contributory negligence, its verdict for defendant is reversed and the matter is remanded for a new trial.
Appellate Division; Siron v. Behan et al, A-3484-86T1; opinion by Shebell, J.A.D.; decided March 24, 1988; approved April 6, 1988; in Opinions Approved column April 14, 1988.

121 N.J.L.J. Index Page 1349.

PRO HAC VICE ADMISSION

A criminal defendant was denied his Sixth Amendment right to counsel of choice when the trial judge denied his *pro hac vice* motion based on the availability of qualified local counsel and the generalization that the presence of out-of-state counsel poses delays that would not occur when only in-state attorneys are used.

Fuller v. Diesslin et al, Civil No. 87-2353; opinion by Ackerman, U.S.D.J.; filed February 10, 1988.

121 N.J.L.J. Index Page 813.

PTI

Although the prosecutor's decision, based on defendant's extensive welfare fraud, not to follow the PTI director's recommendation to admit her may not have constituted a patent and gross abuse of discretion, it was not premised on a consideration of all the relevant, individual factors and a remand for reconsideration is warranted.
Appellate Division; State v. Burger, A-2790-85T4; opinion by Gaynor, J.A.D.; decided January 20, 1988; approved February 9, 1988.

121 N.J.L.J. Index Page 612.

Participants in a pretrial intervention program may not have their programs terminated solely on the fact of a subsequent arrest or indictment since that would deny them the presumption of innocence and threaten their Fifth Amendment rights; additionally, "fundamental fairness" requires that they be guaranteed counsel at termination hearings.
Law Division; State v. Fenton, etc., 86-0267; opinion by Haines A.J.S.C.; decided June 9, 1987; approved October 27, 1987.

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Although, technically, the constable's execution of a writ of replevin that had not been signed by a judge (because the action had been dismissed) involved a breach of the public trust, there is adequate factual support for his position that he mistakenly believed that the authorizing documents were in order; further, the program director correctly concluded that defendant (a first offender) is amenable to rehabilitation, and the trial judge's conclusion that the attorney general's objection to defendant's diversion did not constitute an egregious injustice and unfairness or a patent and gross abuse of discretion is rejected and the order denying admission to PTI is reversed.
Appellate Division; State v. Hoffman, A-1036-87T5; opinion by Gaynor, J.A.D.; decided March 31, 1988; approved April 19, 1988; in Opinions Approved column April 28, 1988.

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PROSECUTORS
(See also **Counties**)

The prosecutor's mischaracterization of defense counsel's role (to obfuscate the facts) was wholly inexcusable, but this fleeting and isolated dereliction could not possibly have prejudiced defendant; instances of excesses in summation that violate the special ethics rules governing prosecutors, which seem to come to the Appellate Division with numbing frequency but often go unpunished by reversal because no prejudice resulted, may be referred to the appropriate district ethics committee for disciplinary action.

Appellate Division; State v. Watson, A-4443-86T4; opinion by Baime, J.A.D.; decided April 13, 1988; approved April 20, 1988; in Opinions Approved column May 19, 1988.

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PUBLIC EMPLOYMENT
(See also **Contempt** and **Firefighters**)

The township's deputy clerk is a confidential employee who may not belong to the collective negotiating unit; even if that were not so, the township's decision not to reappoint her was a managerial prerogative and thus not subject to binding arbitration.
Appellate Division; Wayne Tp. v. AFSCME, Council 52, Local 2192, A-2683-86T7; opinion by Antell, P.J.A.D.; decided October 8, 1987; approved November 2, 1987.

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A municipal ordinance that prohibits a police officer from withdrawing his retirement application once he has elected to take his retirement and to accept any of the benefits (such as accumulated sick time) properly addresses the orderly process of retirement and the recruitment of new employees; it does not have any impact on employee pensions and is therefore not preempted by, or in conflict with, the Police & Firemen's Retirement System statutes or regulations.

Appellate Division; North Arlington PBA Number 95 v. Borough of North Arlington, A-2863-86T8; opinion by Gruccio, J.A.D.; decided December 15, 1987; approved January 11, 1988.

121 N.J.L.J. Index Page 473.

A public institution of higher education's decision to exercise its option, pursuant to N.J.S.A. 10:5-2.2, to retire tenured faculty members who attain the age of 70 is an inherent management prerogative and non-negotiable, although the manner and means that the institution uses to implement its decision may be negotiated.

Appellate Division; University of Medicine and Dentistry of New Jersey v. UMDNJ Council of American Ass'n of University Professors Chapters etc., A-5007-86T8; opinion by Landau, J.A.D.; decided March 8, 1988; approved March 18, 1988; in Opinions Approved column March 31, 1988.

121 N.J.L.J. Index Page 1058.

PUBLIC UTILITIES

Whether the sale or transfer of an owner's or manager's stock in a public utility engaged in the business of collecting solid waste consists of majority control or less, and regardless of to whom it is made, it requires the prior approval of the BPU under the Solid Waste Control Act and its implementing regulations; the BPU's finding that this transfer of 100% of the stock of a business convicted of conspiracy to restrain trade by its owner, also so convicted, without BPU approval, was void as violative of N.J.S.A. 48:3-7 and N.J.A.C. 14:3-10.13(a) is affirmed.
Appellate Division; In re Inter County Refuse Service, Inc., A-4138-85T8; opinion by Coleman, P.J.A.D.; decided January 21, 1988; approved February 3, 1988.

121 N.J.L.J. Index Page 689.

The resolution of the Passaic Valley Water Commission distributing $500,000 to its three owner cities because of "a surplus in 1985 as a result of its operations" was arbitrary, capricious and unreasonable; there was no such surplus and the distribution was made from retained earnings, and the three cities shall return the money to the Commission (whether distribution of a surplus would be ultra vires is for legislative clarification).
Law Division; Mayor and Municipal Council of Clifton et al v. Passaic Valley Water Comm'n et al, etc., L-051669-86 P.W.; opinion by Saunders, J.S.C.; decided July 21, 1987; approved February 3, 1988; in Opinions Approved column March 24, 1988.

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PUBLIC UTILITIES — TORT CLAIMS ACT

The Board of Public Utilities, the Department of Environmental Protection and the counties named as defendants in these allegations of nuisance are public entities immune from liability for their policymaking function regarding the use of the landfill; however, the privately owned business that operates the landfill is not entitled to any derivative immunity under the Tort Claims Act since the public entities did not provide plans and specifications as to its day-to-day operation, and plaintiffs may maintain their nuisance action against that defendant.
Chancery Division; East Brunswick et al v. Middlesex County Board of Freeholders et al, C-5738-87; opinion by Bachman, J.S.C.; decided December 14, 1987; approved December 26, 1987; in Opinions Approved column March 10, 1988.

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REAL ESTATE
(See also **Liens**)

Where, as here, a contract for the sale of real estate provides that the mortgage contingency can be waived by the purchasers, a mortgage in any amount that satisfies the purchasers also satisfies the contingency clause; the sellers should not have declared the contract void when the purchasers obtained a mortgage commitment for less than the amount stated in the clause, and the purchasers must be granted specific performance.

Appellate Division; Friedman v. Chopra et al, A-2466-86T8; opinion by Bressy, J.A.D.; decided October 14, 1987; approved October 28, 1987.

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Language that allegedly creates a fee simple determinable with a possibility of reverter is to be strictly construed; the language in this deed referring to the statute authorizing the United States to purchase land for lifeboat stations does not express an intent that the property would return to the grantors when that use ceased, and the United States acquired an estate in fee simple absolute when it paid $2,400 for the property in 1894.
Law Division; United States Trust Co. of N.Y. et al v. State of New Jersey, L-044539-85; opinion by Stamelman, J.S.C.; decided February 4, 1987; approved May 6, 1987; in Opinion Approved column February 25, 1988.

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The arrangement here, where the engaged couple purchased a condominium in both their names but only plaintiff contributed to the purchase price, was conditioned on marriage; now that the engagement has been broken, the property equitably belongs to plaintiff provided he has any obligation of defendant on the mortgage removed.
Chancery Division; Aronow v. Silver, C-6821-86; opinion by Haines, A.J.S.C.; decided November 17, 1987; approved February 9, 1988.

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REALTORS

Here, where a broker representing the purchaser approached the seller, the original broker was deprived only of its commission as listing broker when the seller paid the interloping broker the full commission; plaintiff's judgment should have been diminished by the amount of the commission it would have shared with the selling broker if the offer had been referred to it.
Appellate Division; The Kislak Company, Inc. v. Hirschfeld, A-532-86T1; opinion by Dreier, J.A.D.; decided February 16, 1988; approved March 3, 1988.

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RECEIVING

Where a defendant is merely a passenger in a car he knows to be stolen, but does not possess it because he lacks the necessary dominion and control over it, he may not be convicted of receiving a stolen auto in contravention of N.J.S.A. 2C:20-7.
Appellate Division; State v. McCoy, A-5087-85T4; opinion by Scalera, J.A.D.; decided February 22, 1988; approved March 4, 1988; in Opinions Approved column March 17, 1988.

121 N.J.L.J. Index Page 916.

RELIGION
(See also **Evidence, Municipal Land Use**)

Free Exercise Clause does not prohibit government from using public lands near tribal religious ritual sites.

Lyng v. Northwest Indian Cemetery Protective Association, 86-1013, U.S. Supreme Court on Writ of Certiorari from the U.S. Court of Appeals for the 9th Circuit, April 19, 1988.

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RELIGION — ROOMING HOUSE ACT

The Legislature did not intend to exclude religious organizations that provide rooming and boarding facilities to the needy from the Rooming and Boarding House Act, and the Dept. of Community Affairs may order plaintiff not to violate its fire-safety provisions; however, should defendant unnecessarily intrude into plaintiff's religious affairs, this matter will be promptly reconsidered.
Supreme Court; Market Street Mission v. Bureau of Rooming and Boarding House Standards, Dept. of Community Affairs, A-93 Sept. Term 1987; opinion by O'Hern, J.; decided May 19, 1988.

121 N.J.L.J. Index Page 1347.

RENT CONTROL (See **Landlord and Tenant** and **Penalties**)

RESENTENCING PROCEEDINGS (See **Death Penalty**)

RES JUDICATA (See **Collateral Estoppel**)

RETROACTIVITY (See **Contractors** and **Criminal Procedure**)

RICO

Pattern of Racketeering Activity.

Marshall-Silver Construction Company, Inc., et al v. Mendel, et al., No. 87-1157, decided Dec. 9, 1987.
On appeal to the United States Court of Appeals for the Third Circuit from the United States District for the Eastern District of Pennsylvania. Opinion by Stapelton, Circuit Judge.

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RIGHT TO COUNSEL (See **Attorney-Client Privilege** and **Drunk Driving**)

SALES TAX — SEARCH AND SEIZURE

An affidavit that catalogued a course of conduct over an extended period of time (during which defendants allegedly committed fraudulent acts of sales-tax evasion and created false records), but failed to provide any information about when the alleged criminal activity occurred, did not provide a reasonable basis for issuing a search warrant, and the trial court correctly suppressed the records seized from defendants.
Although a violation of the Sales and Use Tax Act may be prosecuted under other applicable criminal laws in appropriate cases, defendants (charged with falsely reporting that deliveries were to tax-exempt organizations or non-residents) did not "obtain or retain property" under N.J.S.A. 2C:20-9 or "apply or dispose of property" under 2C:21-15 since there was no basis in those statutes for the prosecutor's concept that the initial five and six percent of a sale of non-exempt personal tangible property belonged to the State (2C:21-15 has since been amended to cover situations where fraudulent schemes are used to avoid paying the required sales tax).
Appellate Division; State v. Altenburg et al, A-37-87T5; opinion by Stein, J.S.C. (t/a); decided March 3, 1988; approved March 11, 1988.

121 N.J.L.J. Index Page 987.

SALES AND USE TAX

N.J.S.A. 54:32B-6 clearly exempts a manufacturer's storage or withdrawal of its products from the use tax, and similarly does not tax such incidental activities as sorting, labeling, packaging and preparing manufactured products for delivery; also, since mere delivery to a common carrier does not trigger the sales tax on goods shipped out of state, delivery of the manufacturer's samples to a common carrier did not trigger the use tax here.
Supreme Court; Cosmair, Inc. v. Director, N.J. Div. of Taxation, A-46 Sept. Term 1987; opinion by Garibaldi, J.; decided March 17, 1988.

121 N.J.L.J. Index Page 733.

SCHOOLS (See **CDS**)

SEARCH AND SEIZURE
(See also **CDS** and **Sales Tax**)

Since, under both state and federal constitutional standards, observations by police during an investigation may be used to bolster the veracity of an informant whose inherent reliability has not been shown but whose information is offered to obtain probable cause for a search warrant, such observations may (where, as here, the circumstances are exigent) be used to bolster the veracity of such an informant's information to establish probable cause to conduct a warrantless search; the drugs found in the zippered container in defendant's car should not have been suppressed.
Appellate Division; State v. Probasco, A-3008-86T5; opinion by Brody, J.A.D.; decided October 15, 1987; approved October 28, 1987.

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The reliability of information is not enhanced simply because it is communicated through police channels; here, where the State did not disclose the source, nature, details or reliability of the information "exchanged" within the arresting officer's police department (that the driver of the car defendant was driving "could have a suspended driver's license") on the basis of which his car was stopped and (after it was found that his license was suspended and that he had a syringe in his sock) searched without a warrant, the order in defendant's trial for armed robbery suppressing the machine gun and clip found in the trunk of the car is vacated to permit the parties to supplement the record.
Appellate Division; State v. Spencer, A-4480-86T5; opinion by Gaulkin, J.A.D.; decided October 30, 1987; approved December 8, 1987.

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Since defendant's arrest was based on the police officer's belief that there was an outstanding warrant for his arrest, the marijuana seized during the search incident to that arrest must be suppressed unless the State provides evidence of that warrant and establishes that it was issued on probable cause.

Appellate Division; State v. Cutlars, A-4046-86T4; opinion by Baime, J.A.D.; decided

March 29, 1988; approved April 13, 1988; in Opinions Approved column April 21, 1988.

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The "good-faith exception" to the exclusionary rule does not apply to situations where a warrant was issued based on information obtained in a prior illegal search; the good-faith exception operates in certain situations where excluding evidence would not deter police misconduct.
United States v. Villard; Criminal No. 87-326; opinion by Rodriguez, U.S.D.J.; filed February 11, 1988.

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SEAT BELTS (See **Products Liability**)

SECURITIES AND EXCHANGE COMMISSION

Section 10(b) — Zero Coupon Bonds.
Ettinger (appellant) v. Merrill Lynch, Pierce, Fenner and Smith, Inc., Third Circuit Court of Appeals, No. 87-1045, filed Dec. 23, 1987.
On appeal from the United States District Court for the Eastern District of Pennsylvania.
Opinion by Seitz, Circuit Judge.

121 N.J.L.J. Index Page 484.

SEC — LIMITATION OF ACTIONS

Rather than applying the six-year statute of limitations applied to common law fraud where the state blue sky law (which contains a two-year statute of limitations) does not provide the plaintiff with a similar cause of action as that provided in actions alleging violations of 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, the proper period of limitations is one year after the plaintiff discovers the facts constituting the violation and in no event more than three years after such violation, as provided in the federal schema of limitations set forth in the Act of 1934.
In Re: Data Access Systems Securities Litigation; Nos. 87-5205, 87-5385; on appeal from the United States District Court for the District of New Jersey — Camden; opinion by **Aldisert**, U.S.C.J.; dissent by **Seitz**, U.S.C.J.; filed May 17, 1988.

121 N.J.L.J. Index Page 1358.

SECOND-INJURY FUND — WORKERS' COMPENSATION

N.J.S.A. 34:15-95.4 (as amended in 1980) provides enhanced benefits for workers disabled in earlier times, and their survivors, where the level of compensation is below current needs; its purpose was not to make the Second Injury Fund a source of the entire death-dependency payment, and the judge of compensation correctly held that the payments awarded to the widow of the injured worker who had been receiving Fund payments (after the employer's disability obligation was exhausted) are to be made solely by the employer.
Appellate Division; Weirle v. American Can Company, A-5552-86T8; opinion by Stein; decided April 21, 1988; approved April 27, 1988; in Opinions Approved column May 19, 1988.

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SELF-INCRIMINATION
(See also **Alibi, Civil Procedure** and **DYFS**)

The prosecutor's asking defendant on cross-examination why he or his attorney had not given the prosecutor before trial his explanation at trial for having signed a confession, which he said at trial was untrue, violated defendant's right to remain silent; the murder conviction is reversed and matter is remanded for a new trial.
Appellate Division; State v. Michalicha, A-5608-84T4; opinion by Antell, P.J.A.D.; decided June 8, 1987; approved November 4, 1987.

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***Miranda* warnings were not required at a location reported to be the scene of a murder where the police interrogation was short, uncoercive, and did not suggest to the suspect, who had not yet been arrested, that he was not free to leave.**
Appellate Division; State v. Coburn, A-5605-84T4; opinion by Coleman, P.J.A.D.; decided December 23, 1987; approved January 22, 1988.

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SELF-INCRIMINATION

***Miranda* warnings were not required here, where defendant arrived at the scene of an arson investigation in a car meeting the description of a suspicious vehicle observed by one of the victims, the questioning was limited to defendant's identification and the reason for his presence, and the extended time before he was allowed to leave was due to his misinformation and voluntary actions; the determinative consideration in whether a reasonable innocent person in such circumstances would understand that the restraint was only temporary.**
Appellate Division; State v. Pierson, A-81-87T5; opinion by Gaynor, J.A.D.; decided February 19, 1988; approved March 4, 1988.

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Once *Miranda* warnings have been given, a subsequent statement is not rendered involuntary merely because the defendant's decision to speak was founded on some ill-conceived notion of the law, and defendant was of sufficient intelligence to know that he was waiving his constitutional right to remain silent when he signed the *Miranda* card and began talking, even though the police allowed him to cross out the words "accused or suspect."

Appellate Division; State v. Freeman, A-5853-84T4; opinion by Michels, P.J.A.D.; decided February 17, 1988; approved March 8, 1988; in Opinions Approved column March 17, 1988.

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The opinion of the State's psychiatrist that any person, such as this 26-year-old defendant, with the mental age of a seven-year-old child can understand and appreciate *Miranda* rights is rejected; the State has failed to prove beyond a reasonable doubt that defendant knowingly and intelligently waived his *Miranda* rights and the confession of child abuse he gave to the prosecutor's investigator is suppressed.
When the investigator from the Division of Youth and Family Services interviewed defendant, she was acting in a law-enforcement capacity and the confession of child abuse she received from defendant must be suppressed because she failed to inform him of his *Miranda* rights (of course, even if she had informed him, the confession would confront the same objection to admissibility as the one defendant gave to the prosecutor's investigator).
Law Division; State v. Flower, Ind. 86-09-0365-I; opinion by **Imbriani**, J.S.C.; decided April 30, 1987; approved March 11, 1988; in Opinions Approved column March 24, 1988.

121 N.J.L.J. Index Page 1062.

Here, where defendant was represented by counsel and his election to testify at his trial for aggravated manslaughter was a tactical decision, there was no duty on the trial court to advise him of his right not to testify or to explain the ramifications of his decision to forego that right.
Appellate Division; State v. Bogus, A-3626-85T5; opinion by **Michels**, P.J.A.D.; decided March 4, 1988; approved March 18, 1988; in Opinions Approved column March 31, 1988.

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SENTENCING
(See also **CDS** and **Plea Bargains**)

In no sense does N.J.S.A. 2C:44-5b(2) require that concurrent sentences imposed at different times be served coterminously.
Appellate Division; State v. Benedetto, A-134-86T4; opinion by **Baime**, J.A.D.; decided December 17, 1987; approved January 14, 1988.

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The trial court clearly considered the reasons defendant gave for not paying the restitution that was a condition of his probation and properly resentenced him to a custodial term; *Bearden* requires a consideration of alternatives to incarceration only where a defendant has failed to pay restitution through no fault of his own.
Appellate Division; State v. Townsend, A-1449-85T4; decided January 21, 1988; approved February 3, 1988.

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The steps required of a judge when imposing a term of imprisonment shield a defendant who receives concurrent sentences of imprisonment that could have been imposed at the same time from having to serve more time solely because they were imposed atdifferent times; if the trial judge did not want defendant to receive credit for time served under a previous sentence, he should have had the sentence run consecutively to that sentence (to the extent that *Richardson* differs from this opinion, it is disagreed with).
Appellate Division; State v. Lawlor, A-366-86T4; opinion by Brody, J.A.D.; decided January 14, 1988; approved February 1, 1988.

121 N.J.L.J. Index Page 615.

A defendant convicted of a Graves Act offense is entitled to notice that an extended term would be sought, based on a prior Graves Act conviction, as well as a hearing on whether there was such a prior conviction; by dispensing with judicial discretion and prosecutorial consent in making the extended term mandatory, the Legislature did not intend to strip defendants of the right to contest the underlying facts.
Supreme Court; State v. Martin, A-84 Sept. Term 1986; opinion by **Wilentz**, C.J.; decided March 24, 1988.

121 N.J.L.J. Index Page 859.

The Appellate Division judgment limiting the effect of N.J.S.A. 2C:44-5b(2) to an overall restraint on the base term of aggregated sentences imposed at different times is affirmed; in this context of a subsequent sentence for an earlier offense running consecutively to a prior sentence, "gap-time" (as distinguished from "jail-time") credits were correctly held only to reduce defendant's aggregate term, not to reduce his judicial parole-ineligibility term made consecutive to the prior sentence.
Supreme Court; Richardson v. Nicklopoulos, A-64 Sept. Term 1987; opinion by O'Hern, J.; decided April 13, 1988; in Opinions Approved column April 28, 1988.

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Supreme Court; McNamara v. Nicklopoulos, A-71 Sept. Term 1987; opinion by O'Hern, J.; decided April 13, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1159.

Although R. 3:9-2 makes no specific provision for apprising a defendant at the time of a plea that the sentence may run consecutively to that imposed on other, unrelated charges for which he has been convicted, that is the preferable practice; however, defendant, who was not so informed, is not entitled to vacate his plea here, where the sentence did not defeat his reasonable expectations under the plea agreement.
Appellate Division; State v. Cullars, A-4046-86T4; opinion by **Baime**, J.A.D.; decided March 29, 1988; approved April 13, 1988; in Opinions Approved column April 21, 1988.

121 N.J.L.J. Index Page 1353.

SENTENCING — SEX OFFENDERS
(See also **Plea Bargains**)

When resentencing a sex offender convicted under Title 2A who is transferred from the Adult Diagnostic and Treatment Center to the general prison population, in accordance with *Gerald*, the individual sentences may be increased in accordance with Title 2C so long as the aggregate term of imprisonment is not increased.
Appellate Division; State v. Bowan, A-2760-86T4; opinion by **Baime**, J.A.D.; decided April 4, 1988; approved April 19, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1453.

SETTLEMENTS — TAXES
(See also **Attorneys' Fees, Tortfeasors**)

Where, as here, plaintiff's claim that withholding taxes should not be deducted from the settlement sum was reasonably arguable and the trial court provided for an indemnification agreement so that defendant was saved harmless in the event that theIRS claimed interest or penalty payments from it, the court properly enforced the agreement between the teacher and the board of education that the settlement sum ("in lieu of litigation" over tenure rights, etc.) would not constitute salary or wages for any purpose.
Appellate Division; Emerick v. Teaneck Bd. of Education, A-1022-86T8; opinion by Dreier, J.A.D.; decided December 9, 1987; approved December 23, 1987.

121 N.J.L.J. Index Page 424.

SEX OFFENDERS
(See **Evidence, Plea Bargains** and **Sentencing**)

SIDEWALKS

The duty of a commercial property owner to maintain abutting sidewalks does not extend to maintaining curbs that are separated from the sidewalk by a grass strip, and the trial court's summary judgment for defendants is affirmed.
Appellate Division; Lovin v. DeVoe et al, A-4794-86T1; opinion by **Brody** J.A.D.; decided October 30, 1987; approved November 25, 1987.

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***Stewart's* extension of liability is clearly limited to abutting "sidewalks" and does not impose a duty on commercial landowners to maintain in good condition contiguous lands owned by others, simply because the public chooses to use those lands as a means of access to the commercial property.**

Appellate Division; Chimiento v. Adam Corp. et al, A-3829-86T7; opinion by **Havey**, J.A.D.; decided December 22, 1987; approved January 14, 1988.

121 N.J.L.J. Index Page 424.

SHIELD LAW

A journalist who knowingly and voluntarily published admissions made to him by the criminal defendant, along with the defendant's name, waived his "Shield Law" privilege against disclosure with respect to the disseminated information, and the State can subpoena him to testify about that information and the source and circumstances under which it was obtained; the privilege remains, however, as to all information undisclosed.
Appellate Division; State v. Mayron, A-4560-86T5; opinion by **Michels**, P.J.A.D.; decided January 28, 1988; approved February 9, 1988.

121 N.J.L.J. Index Page 923.

SNOW REMOVAL — TORT CLAIMS ACT

The absolute immunity for snow-removal activities conferred on public entities by *Miehl v. Darpino* has not been abrogated by the Tort Claims Act; however, under certain circumstances involving palpably unreasonable conduct by a public entity in the context of a snowstorm, but separate and distinct from its snow-removal function, a duty to warn about an extraordinary hazard that would not be reasonably apparent to or anticipated by a careful motorist could arise, the breach of which would not be protected by the *Miehl* immunity, and plaintiff (who alleges injuries caused by a snowbank plowed into Rte. 21), may amend his complaint to plead a claim for relief based on N.J.S.A. 59:4-4.
Supreme Court; Rochinsky v. DOT et al, A-24 Sept. Term 1987; opinion by **Stein**, J.; partial dissents by **Clifford**, J. and **Handler**, J.; decided May 23, 1988.

121 N.J.L.J. Index Page 1345.

SOCIAL SECURITY

Disability Insurance — Review of Administrative Findigs.
Cenigie v. Bowen, Secretary fo the Department of Health and Human Services, No. 87-5197. Appeal from the U.S. District Court for the Middles District of Pennsylvania to the U.S. Court of Appeals for the Third Circuit. Filed Oct. 1, 1987.
Opinion by **Greenberg**, Circuit Judge.

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SOVEREIGN IMMUNITY — SEPTA

Toombs v. Manning, Brown and Southeastern Pennsylvania Transportation Authority, Appealed from the U.S. District Court for the Eastern District of Pennsylvania to the U.S. Court of Appeals for the Third Circuit, Nos. 86-1540/1550. Opinion delivered by **Garth**, Circuit Judge. Filed Dec. 11, 1987.

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SPEEDY TRIAL

The speedy-trial clause of the Sixth Amendment does not apply to the time during which a defendant is not under any official restraint.

Appellate delays should be evaluated against the *Barker* standards; no speedy-trial right was violated here, where the appellate process was held up for a lengthy period as a result of significant delays on defendant's part with no suggestion of purposeful stalling by the government, the issues raised by the State were substantial (and, indeed, resulted in the reinstatement of the conviction), defendant's defense was not impaired, no cognizable prejudice to him resulted and he never claimed a speedy-trial right.
Appellate Division; State v. LeFurge, A-3502-85T4; opinion by **Long**, J.A.D.; decided January 8, 1988; approved January 22, 1988.

121 N.J.L.J. Index Page 569.

SPILL FUND
(See also **Environmental Protection**)

Treble damages need not be assessed against a party who resists payment to the Spill Fund, in violation of a DEP directive, if the party had an objectively reasonable basis for believing that the directive was either invalid or inapplicable to it; if the court determines that a party's basis for non-compliance is objectively reasonable, even if the court does not ultimately uphold the party's argument, DEP's request for treble damages may be rejected if not reasonable in light of all the circumstances (good-cause defenses include challenges to the reasonableness of the costs assessed to the party).
Although DEP's practice of requiring payment by responsible parties while maintaining control over remedial actions is not directly authorized by the Spill Act, the practice is implicit in DEP's broad implied powers.
Supreme Court; In the Matter of Kimber Petroleum Corporation et al. A-127/128 Sept. Term 1986; opinion by **Handler**, J.; dissent by **Wilentz**, C.J.; decided April 18, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1049.

The owner of a landfill who failed to comply with specific requirements of the Department of Environmental Protection for continued operation, resulting in the closure of the landfill and an order from DEP directing the owner to fund a remedial investigation and feasibility study or face treble damages for non-compliance, is entitled under *Kimber* to assert a good-cause defense to the directive.
Supreme Court; In the Matter of J.I.S. Industrial Service Co. et al, A-126 Sept. Term 1986; opinion by **Handler**, J.; dissent by **Wilentz**, C.J.; decided April 18, 1988; in Opinions Approved column April 28, 1988.

121 N.J.L.J. Index Page 1051.

SPILL FUND — TAXES

The fact that the State or a local government may make a claim against the Spill Fund for up to one year of tax revenue lost as a result of damage to property from hazardous waste does not imply that there is an automatic abatement of taxes during the time defendant was deprived of all possessory rights to his property during the DEP cleanup; the appropriate way for defendant to have sought tax relief was to

seek a reassessment under N.J.S.A. 54:4-35.1.
Appellate Division; Newark v. Block 1183 Lots 11&12 et al, , A-4260-86T7; opinion by Drier, J.A.D.; decided February 5, 1988; approved February 22, 1988.

121 N.J.L.J. Index Page 810.

STARE DECISIS

Reconsideration of particular precedent does not affront settled jurisprudence.

Patterson v. McLean Credit Union, 87-107, U.S. Supreme Court on Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit, April 25, 1988.

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STATUTE OF FRAUDS

Where plaintiff was negotiating with defendant corporation for the sale of defendant's real estate interests and execution of the contract was contingent on the approval of the vice-president of the corporation, plaintiff could not recover damages against defendant for selling its interest to another party; neither the signature of defendant's real estate manager, who was only acting as a witness, nor an unsigned typed memorandum on the vice-president's stationery bearing the company's letterhead satisfied the statute of frauds, and plaintiff's actions in preparing a sublease with a third party did not constitute part performance sufficient to take this case out of the statute of frauds — defendant did not expressly promise to deal exclusively with plaintiff or induce plaintiff to change its position by directing it to obtain the sublease as a condition for the purchase of the property.

Appellate Division; Kopp, Inc. v. United Technologies, Inc. et al, A-4669-86T1; opinion by Michels, P.J.A.D.; decided March 3, 1988; approved March 11, 1988; in Opinions Approved column April 14, 1988.

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Although the purchase price was left blank in the option to buy in the rider to the lease between defendant (the tenant) and plaintiff's late husband (the landlord) pending an appraisal, it is not necessary that the terms of a contract be agreed to or written down at one time or be on one piece of paper and the statute of frauds could be satisfied where the landlord's authorized agent wrote in the price later on a copy of the rider at the landlord's direction and confirmed that he had done so in two letters.
Appellate Division; Sutton v. Lienus, A-3857-86T8; opinion by Stern, J.A.D.; decided March 31, 1988; approved April 19, 1988; in Opinions Approved column.

121 N.J.L.J. Index Page 1399.

STRICT LIABILITY IN TORT

State of the Art Defense. ***Santiago, appellant, v. Johnson Machine and Press Corp. et al.***, No. 87-1230, Appeal from the U.S. District Court for the Eastern District of Pennsylvania to the U.S. Court of Appeals for the Third Circuit, Slip Opinion Dec. 4, 1987.
Before: **Higginbotham, Hutchinson** and **Scirica**, Circuit Judges. Opinion delivered by **Higginbotham**, Circuit Judge.

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SURETIES (See **Arbitration**)

SURVIVAL ACT (See **Malicious Prosecution**)

TAMPERING (See **Free Speech**)

TAXES
(See also **Commerce Clause, Environmental Protection, Freeze Act, Limitations of Actions** and **Settlements**)

Economic rent for the taxpayer's garden-apartment complex should not have been calculated by adding a 2½% inflationary factor to the actual rent.
Appellate Division; Boulevard Gardens, Inc. et al v. Bayonne, A-5914-85T8; opinion by **Furman**, P.J.A.D.; decided October 21, 1987; approved November 4, 1987.

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Exclusion for Tort Recovery.
***Bent v. Commissioner of Internal Revenue*, No. 87-1090, Decided Dec. 15, 1987.**

On appeal to the United States Court of Appeals for the Third Circuit from the United States Tax Court.
Opinion by Maris, Circuit Judge.

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Corporation was mere agent for shareholders and property owner for tax purposes.

Commissioner of Internal Revenue v. Bollinger, 86-1672, U.S. Supreme Court on appeal from 6th Circuit, March 22,1988.

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Project notes subject to estate taxes.

United States v. Well Fargo Bank, 86-1521, U.S Supreme Court on appeal from District Court, Central District of California, March 23, 1988.

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Federal tax on municipal bonds upheld.

South Carolina v. Baker, 94, U.S. Supreme Court on appeal from original jurisdiction, April 20, 1988.

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Louisiana's imposition of use tax on department store catalogs mailed to residents does not violate Commerce Clause.

D.H. Holmes Co., Ltd. v. McNamara, 87-267, U.S. Supreme Court on appeal from the Louisiana Court of Appeals for the Fourth Circuit, May 16, 1988.

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A reduction on the tax assessment for private parkland held for the exclusive interest of the surrounding residential owners in the planned community development, who by deed have a per acre proportionate share in the trust property, was correctly denied; generally, the independent holding of separate legal interests in taxable property does not affect the method of valuing and assessing the total property, and plaintiff trustee of the parkland presented no dollar figures that would have aided a determination of whether a double-taxation situation existed here.
Appellate Division; Trustees of Llewellyn Park v. West Orange, A-3720-86T1; opinion by **Gruccio**, J.A.D.; decided April 11, 1988; approved April 19, 1988; for Opinions Approved column May 19, 1988.

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THEFT (See **Burglary**)

THEFT OF ELECTRICITY

In defendant's trial for theft of electrical services under N.J.S.A. 2C:20-8a, the trial judge properly applied the presumptions of subsections c and d that the existence of meter tampering is presumptive evidence that the person to whom the electricity is being furnished (for more than 31 days) created the condition with intent to defraud.
Appellate Division; State v. Dixon, A-234-86T4; opinion by **Scalera**, J.A.D.; decided October 15, 1987; approved October 28, 1987.

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THEFT OF SERVICES

A person who knowingly accepts services (here, natural gas) without payment, knowing that they are available only for compensation, does not violate N.J.S.A. 2C:20-8a unless there is a verbal or physical act of deception, fraud or threat, or false token, slug, mechanical or electronic device or like means to avoid payment; the criminal law is not a remedy for a utility's self-created failure to bill a customer for 11 years (civil liability, not contested here, is another matter).
Appellate Division; State v. Kocen, A-4371-86T4; opinion by **Cohen**, J.A.D.; decided February 5, 1988; approved March 4, 1988.

121 N.J.L.J. Index Page 862.

TITLE INSURANCE

A title insurer was properly held to have guaranteed the property described in its policy, which was based on an inaccurate survey, even though the policy contained an exception for defects "which could be disclosed by an accurate survey *and* inspection of the premises," since an "accurate survey" is one based on the description of the property as stated in the deed and title policy; if the insurer wanted to protect itself against an inaccurate survey or description of the property, it should have used clear and simple language to put plaintiff on notice that it was not insuring the description set forth in the policy.
Appellate Division; Walker Rogge, Inc. v. Chelsea Title & Guaranty; A-2262-86T1; opinion by **Shebell**, J.A.D.; decided February 1, 1988; approved February 16, 1988.

121 N.J.L.J. Index Page 685.

TORT CLAIMS ACT
(See also **Condemnation** and **Damages**)

No danger inhered in the public high school's property itself in its relative shortage of parking spaces, and summary judgment was properly granted the school here, where an adult evening student was injured by a car when she jaywalked from a shopping-center parking lot across a county road to reach the school; ***Warrington* is distinguished.**
Appellate Division; Rose v. Moore et al, opinion by **Furman**, P.J.A.D.; decided October 28, 1987; approved November 19, 1987.

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There is no advantage in a physical-defect/activity dichotomy since, in most cases, the dangerous-condition standard of N.J.S.A. 59:4-1a and 4-2 requires a consideration of both the physical characteristics of the public property and the nature of the activities permitted on that property; however, the Legislature did not intend a high volume of vehicular and pedestrian traffic to constitute a "dangerous condition," and the summary judgment for the public entities in this case is affirmed.
Appellate Division; King v. Brown et al, A-1073-86T8; opinion by **D'Annunzio**, J.A.D.; decided November 16, 1987; approved November 30, 1987.

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The immunity provided by N.J.S.A. 59:4-8 bars liability for the death of plaintiff's decedent and the injuries sustained by plaintiff when the boat in which they were fishing on a State-owned lake in a wildlife-management area was swept over a dam; the effect of that statute is not abrogated merely because a dangerous artificial condition on unimproved property was causally related to the injury.
Appellate Division; Troth v. New Jersey, A-4713-86T5; opinion by **Gaynor**, J.A.D.; decided February 5, 1988; approved February 22, 1988.

121 N.J.L.J. Index Page 805.

If a factual determination is reached at trial that the State did not undertake a duty to make safe the icy roadway that precipitated the accident in which plaintiff was injured, the State would be entitled to a verdict in its favor; if a factual determination to the contrary is reached, liability would be imposed against the State pursuant to N.J.S.A. 59:2-2(a), upon a further factual determination that State employees had been negligent in failing to perform that duty.
Appellate Division; Pico v. New Jersey et al, A-3658-86T8; opinion by **Furman**, P.J.A.D.; decided March 10, 1988; approved March 23, 1988; in Opinions Approved column March 31, 1988.

121 N.J.L.J. Index Page 1116.

Twelve hundred plaintiffs who suffered damages as a result of a well-publicized flood, many of whom had not yet returned to their homes after the flood and whose records were destroyed or unavailable, substantially complied with the notice requirements of N.J.S.A. 59:8-4 when they asserted that they had suffered "property damage and personal injuries due to flooding," even though they did not provide a computation for the amounts claimed; they are also excused, in this unusual case, for any failure to complete supplemental claim forms that called for specific information.
The motion to allow 26 additional plaintiffs to file late notices of claim in this case involving extensive flooding is granted; delay in obtaining attorneys due to their understandable reluctance to handle a difficult and complex case is excusable, and there cannot be any prejudice to defendants since the flood was not an obscure and unnoticed event.
Law Division; McGrath et al v. North Jersey District Water Supply Commission et al, L-024903-85; opinion by **Saunders**, J.S.C.; decided October 17, 1986; approved April 8, 1988; in Opinions Approved column April 21, 1988.

121 N.J.L.J. Index Page 1224.

TRIAL BY JURY — INSTRUCTIONS — POSSESSION

***Le Furge* never intended that a defendant could be found vicariously liable as an accomplice or co-conspirator in the absence of such a determination by a jury, which must be appropriately instructed on the theory advanced for a criminal conviction; this jury was not charged that it could find defendant guilty of the CDS possession counts on the basis of vicarious liability as an accomplice or as a conspirator (the charge on conspiracy, of which he was also convicted, related only to that crime) but was only charged under the theory of constructive possession where indirect possession did not evidence a capacity to control the cocaine, and the possession convictions cannot stand.**
Supreme Court; State v. Schmidt; A-52 Sept. Term 1987; opinion by **O'Hern**, J.; dissent by **Stein**, J.; decided May 16, 1988; in Opinions Approved colmn May 26, 1988.

121 N.J.L.J. Index Page 1214.

TRUCKS (See **Commerce Clause**)

UCC
(See also **Checks**)

N.J.S.A. 12A:2-708 was designed to provide a dealer-seller of standardized goods in unlimited supply the additional relief of recognizing that, had the breaching buyer performed, the dealer would have made two sales instead of one; it was reversible error for the trial judge to reject the car dealer's effort to establish its "lost volume" profit merely because it had sold the pickup truck, which defendant had allegedly contracted to buy, to another purchaser for substantially the same price, and the matter is remanded for trial.
Appellate Division; Van Nose Motors, Inc. v. Vikram, A-3205-86T6; opinion by **Landau**, J.A.D.; decided November 17, 1987; approved December 2, 1987.

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UIM COVERAGE
(See also **Insurance**)

The automobile-insurance renewal that contained only a declaration page and a notice did not abridge the insured's rights to underinsured-motorist coverage under the original policy because the notice did not clearly explain to the average layman that the UIM coverage was being deleted from UM coverage but was available at a small additional premium.

Appellate Division; Wasserman et al v. Wharton, Lyon & Lyon et al, A-4153-86T7; opinion by **Pressler**, J.A.D.; decided March 2, 1988; approved March 23, 1988; in Opinions Approved column March 31, 1988.

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UM COVERAGE

A vehicle is "uninsured" within the meaning of N.J.S.A 17:28-1.1e(2)(a) whenever insurance or authorized self-insurance is unavailable by reason of insolvency or bankruptcy, and the injured passenger may recover under her host driver's uninsured-motorist coverage here, where the tortfeasor is a self-insured trucker in voluntary federal bankruptcy.
Appellate Division; Goodwin v. Rutgers Casualty Ins. Co. A-2558-86T8; opinion by **King**, P.J.A.D.; decided March 1, 1988; approved March 11, 1988; in Opinions Approved column March 24, 1988.

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UNEMPLOYMENT COMPENSATION
(See also **Evidence** and **Welfare**)

Since the truck driver's conviction for drunk driving was not job-related, the Board of Review properly determined that he was not disqualified from unemployment benefits when his employer fired him because his license had been suspended for six months.
Appellate Division; Yardville Supply Co. v. Bd. of Review, Dept. of Labor, A-5923-85T6; opinion by **Pressler** , P.J.A.D.; decided January 26, 1988; approved February 3, 1988.

121 N.J.L.J. Index Page 610.

URESA (See **Choice of Law**)

VACATION PAY (See **ERISA**)

VIDEOTAPES (See **Evidence**)

WEAPONS
(See also **Assault**)

Where, as here, an implement is susceptible of both lawful and unlawful uses, its status as a weapon whose possession can subject its possessor to a charge of violating N.J.S.A. 2C:39-5(d) is entirely dependent on the circumstances attending the possession; defendant's bare possession in his pocket of an ordinary, closed folding knife as he was walking down the street cannot, in the absence of a single additional incriminating circumstance, sustain a criminal conviction.
Appellate Division; State v. Blaine, A-630-86T4; opinion by **Pressler**, P.J.A.D.; decided November 2, 1987; approved November 25, 1987.

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WELFARE

It is the statutory obligation of the Commissioner of Human Services to establish a "standard of need" for recipients of Aid to Families with Dependent Children and General Assistance; neither program can be carried out as intended by the Legislature in the absence of a standard based on the actual cost in New Jersey of purchasing the necessary food, clothing, shelter and basic essentials for health and safety.
Appellate Division; In re N.J.A.C. 10:82-1.2 and 10:85-4.1, A-157-86T8; opinion by **Shebell**, J.A.D.; decided March 10, 1988; approved March 23, 1988; in Opinions Approved column March 31, 1988.

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WELFARE — UNEMPLOYMENT BENEFITS

The overpayment of unemployment benefits to petitioner (not resulting from any wrongful conduct by her), which she must repay, is analogous to a personal loan that is an "exempt resource" not to be considered in determining eligibility, and the director of the Division of Public Welfare should have reconsidered the denial of AFDC benefits when petitioner pre-

sented the newly discovered evidence of the mistake in the amount of unemployment benefits she had received.

Appellate Division; Saldana v. Essex County Division of Welfare, A-5691-85T1; opinion by **Landau**, J.A.D.; decided November 16, 1987; approved April 7, 1988; in Opinions Approved column April 21, 1988.

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WIRETAPS

New Jersey's Wiretapping and Electronic Surveillance Control Act's proscription of interceptions done at the direction of "an investigative or law-enforcement officer" in the absence of a determination by the Attorney General, his designee or a county prosecutor of "reasonable suspicion that evidence of criminal conduct will be derived" does not apply to interceptions made by federal agents in Pennsylvania of phone calls made by an individual cooperating with the agents to defendant in New Jersey; the Act cannot reach beyond New Jersey's legislative jurisdiction to proscribe as unlawful interceptions by federal agents that are lawful in the jurisdiction where made, and the evidence was properly admitted in defendant's trial for conspiracy to distribute cocaine.

Appellate Division; State v. Minter, A-620-85T4; opinion by **Furman**, P.J.A.D.; concurrence by **Brody**, J.A.D.; decided February 8, 1988; approved February 23, 1988.

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The telephone company could intercept conversations on defendant's "blue box" to detect the theft of its services, and that information could properly be included in the police affidavit in connection with the wiretap application.

Appellate Division; State v. Pemberthy etc., A-767-84T4; per curiam (Judges Petrella, Dreier and Baime) opinion; decided April 5, 1988; approved April 20, 1988; in Opinions Approved column April 28, 1988.

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WORKERS' COMPENSATION
(See also **Minors, Negligence,** and **Second-Injury Fund**)

The remedy of N.J.S.A. 34:15-28.1 is exclusive to all forms of common-law redress where a compensation carrier with the alleged intent to inflict harm wrongfully terminates temporary disability benefits, and it applies where, as here, a compensation carrier has unilaterally terminated court-adjudicated temporary benefits.

Appellate Division; Dunlevy v. Kemper Ins. Group et al, A-2499-86T7; opinion by

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While the completed exposures in this case and in the cases argued by appellant all occurred before January 16, 1980 (the effective date of the new rates) only this petitioner's occupational disease was legally manifest after that date, and the compensation judge's award under the new, higher rates for bladder cancer and related neuropsychiatric permanent disability is affirmed.

Appellate Division; Falcon v. American Cyanamid et al, A-4306-85T7; opinion by **King**, P.J.A.D.; decided March 26, 1987; approved December 2, 1987.

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N.J.S.A. 34:15-12(c) authorizes the award of an amputation increment only to workers whose injuries are permanent and partial, and the compensation judge erroneously awarded a 30% amputation increment here, where the petitioner was properly determined to be permanently and totally disabled.

Appellate Division; Padilla v. Concord Plastics, Inc., A-0273-86T8; opinion by **Baime**, J.A.D.; decided December 8, 1987; approved December 16, 1987.

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Contrary to the holding of *Pruzecki*, the 1979 amendment to N.J.S.A. 34:15-7.2 requires that the strain of the work effort that allegedly precipitated a worker's disability or death from coronary disease was qualitatively more intense than the strain of the worker's daily activities *outside* of the workplace.

The Legislature's modification of the *Dwyer* criteria requires more reliable proof of the connection between work effort and cardiac dysfunction, and an expert witness's conclusion that work effort caused "in a material degree" the cardiovascular injury or death should be carefully evaluated in the context of both the statutory criteria and prevailing medical standards; the worker's medical history, the intensity and duration of the precipitating work effort, and the time between that effort and the evidence of heart dysfunction should also be taken into account.

Considering the intensity and duration of the work effort in this case, the short interval between it and decedent's collapse, and nothing to suggest that his activities outside of work were as vigorous, the compensation judge's conclusion that it caused the death "in a material degree" should not be disturbed.

Supreme Court; Hellwig v. J.F. Rast & Company, Inc., A-53 Sept. Term 1987; opinion by **Stein**, J.; decided March 31, 1988; in Opinion Approved column April 14, 1988.

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The trial court erred in requiring equal contribution among three employers where the medical evidence showed a permanent partial disability resulting from an accident during the course of the first employment but failed to demonstrate a material subsequent lessening of working ability or a significant increase in disability attributable to the two subsequent employments; the judgment against the first employer is increased to encompass the entire award.

Appellate Division; Kozinsky v. Edison Products Co. et al. A-1172-86T7; opinion by **Landau**, J.A.D.; decided February 9, 1988; approved March 3, 1988.

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Under N.J.A.C. 12:235-5.2(e), documents supporting a motion are a sufficient basis for an order for temporary disability or medical benefits *unless* they are contradicted or opposed on material matters by reports, testimony, affidavits or certifications in opposition to the motion; in such a case, the petitioner must produce witnesses who can be cross-examined.

Appellate Division; Hogan v. Garden State Sausage Co., A-5763-86T8; opinion by **Cohen**, J.A.D.; decided February 25, 1988; approved March 18, 1988; in Opinions Approved column March 31, 1988.

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WRONGFUL DEATH —

Central to the scheme of N.J.S.A. 2A:31-4 are the elements of dependency (to be determined as of the date of the wrongful death) and pecuniary loss; the net proceeds of this action should be equitably divided between the widow and the dependent child, with such minimal allocation to the two adult children as may be justified at a plenary hearing (if a settlement is not reached).

Appellate Division; Wolff et al v. Mercer Medical Center et al, A-2598-86T7; opinion by **Graccio**, J.A.D.; decided October 16, 1987; approved November 2, 1987.

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WRONGFUL DISCHARGE
(See also **Employment** and **OSHA**)

Plaintiff, who was allegedly fired by his employer to avoid paying commissions due to him, could not assert a cause of action for wrongful discharge on the basis of a violation of public policy under *Pierce*; however, evidence of the employer's attempts to avoid paying the commissions would be relevant on plaintiff's *Woolley* claim that the procedures in the employer's policy manual for terminating employment were not followed in his case, and the summary judgment on that count is reversed.

Appellate Division; Schwartz v. Leasametric, Inc. et al, A-3927-86T7; opinion by **Shebell**, J.A.D.; decided March 23, 1988; approved April 13, 1988; in Opinions Approved column April 24, 1988.

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